Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

75-125

Richard J. Getty ..... Petitioner

vs.

Commonwealth of Kentucky, Ex Rel
Kentucky Bar Association ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

Richard J. Getty ..... **Petitioner**

vs.

Commonwealth of Kentucky, Ex Rel Kentucky Bar Association ..... **Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a Writ of Certiorari issue to review the Judgment herein of the Court of Appeals of Kentucky entered upon the 17th day of January, 1975; Petition for rehearing filed February 13, 1975; denied April 25, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky has not yet been reported and is printed in Appendix B, pp. 17a-27a.

JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on January 17, 1975, Appendix B, pp. 17a-27a. A Petition for Rehearing was filed on February 13, 1975. It was denied on April 25, 1975, Appendix B, p. 16a. A mandate was issued on April 28, 1975, Appendix B, p. 15a, suspending the Petitioner from the practice of law in the Commonwealth of Kentucky for a period of one month. A "corrected" copy was issued May 6, 1975, changing the period of suspension from one to six months. Appendix B, pp. 12a-13a.

On motion of the Respondent a stay of execution and enforcement of the mandate of the Court of Appeals was granted on May 2, 1975, for a period to and including August 29, 1975, in order that the Respondent might make application to the Supreme Court of the United States for a Writ of Certiorari. It was further ordered that any additional requests for any stay being necessary should be addressed to the Supreme Court of the United States. Appendix B, pp. 13a-14a.

The jurisdiction of this Court invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is an attorney deprived of due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of these United States of America when a State Court of last resort substitutes its own opinion as to the credibility of conflicting witnesses, which opinion is solely based upon a written transcript, for that of the Trier of Fact, and, without giving the accused a hearing before it on the controverted matters, suspends him from the practice of law?

2. Does the lack of any standards or procedural safeguards in Kentucky Revised Statute 30.170, granting the Court of Appeals the authority to regulate the practice of law, make its effects so uncertain as to deny attorneys due process of law and equal protection of the laws under the Fifth and Fourteenth Amendments to the Constitution of these United States of America, as well as permitting the Court of Appeals to enact rules susceptible of sweeping and improper application limiting First Amendment freedoms?

3. Was the suspension of the Petitioner so lacking of a rational basis in the evidence as to be arbitrary and discriminatory and thus a denial to him of due process of law and equal protection of the laws?

4. Does the imposition of all the costs of a disciplinary proceeding, amounting to over $2,000.00, upon an attorney acquitted of all charges by the Trier of Fact, found innocent of nine out of ten charges by the Board of Governors of the Bar Association, and found innocent of six out of ten charges by the Court of last resort, deprive the accused of due process of law and equal protection of the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.A., Section 1257(3)

United States Constitution, Amendments I, V and XIV, Appendix, pp. 1a-2a.

Kentucky Revised Statute 30.170, Appendix A, pp. 2a-3a.

Rules of the Court of Appeals of Kentucky 3.130, 3.230, 3.330, 3.360, 3.370, 3.410, Appendix A, pp. 3a-10a.

STATEMENT OF THE CASE

On May 3, 1973, the Kentucky Bar Association made a complaint against Richard J. Getty, alleging unethical conduct on the part of Petitioner during the course of representing Lance Kohler on a

criminal charge in the Fayette County Circuit Court, Indictment Number 9150. This complaint contained six charges, denominated by the Trial Committee as charges I through VI during the hearing before it and in their report. Appendix B, pp. 33a-34a.

On August 2, 1973, an additional complaint was made against Getty. It consisted of four counts, denominated by the Trial Committee as counts VII through X, relating to Getty's conduct as defense counsel in the cases of *Commonwealth* vs. *Campbell*, Harrison County Court; *Commonwealth* vs. *Morgan*, Nicholas Circuit Court; and *Commonwealth* vs. *William Hilander, Jr.*, Nicholas County Court, Appendix B, pp. 34a-36a. Nicholas and Harrison Counties are in the same judicial district, having the same Circuit Judge and Commonwealth Attorney, and a close relationship between many of their public officials.

Richard J. Getty graduated from the College of Law at the University of Kentucky at Lexington in June, 1951. From July, 1951, to April, 1952, he practiced law in Lexington, Kentucky. He then moved to California where he worked or was self-employed as a claims adjuster until January, 1965. He then practiced law in Georgetown and Lexington, Kentucky, until September, 1966.

In September, 1966, he returned to California and re-entered the adjustment business. He resumed the practice of law in Kentucky in the summer of

1971, when he undertook the Kohler case out of which Charge Number I, or Charges I-VI, as designated by the Trial Committee, arose.

At the time the Petitioner undertook the Kohler case he had actual experience in the practice of law of approximately thirty months. At the time he represented Earl Morgan in the Nicholas Circuit Court in October, 1973, he had actually been engaged in the practice of law for less than four years, although his age may have led people to believe that his experience was much greater. (T.C., Vol. X, pp. 865, 875).[1]

Lance Kohler came to trial in the Fayette Circuit on October 8, 1971, upon a felony charge. He was convicted. (T.C., Vol. I, p. 59). Getty took an appeal to the Court of Appeals of Kentucky which reversed the conviction. However, prior to that time, Kohler, who was imprisoned at LaGrange Penitentiary, became mad at Getty and filed an affidavit with the Court of Appeals seeking a change of counsel. It was denied.

Kohler's affidavit contained certain scurrilous charges against Getty whcih became the basis for

1. The Transcript of Testimony in Commonwealth vs. Morgan will be designated herein as Morgan; the Transcript of Commonwealth vs. Hilander as Hilander; the Transcript of Commonwealth vs. Getty upon Appeal to the Harrison Circuit Court as Getty; and the Transcript of Hearings before the Trial Committee as T.C.

the six counts of the first complaint. The Trial Committee and the Board of Governors refused to believe them. The Court of Appeals denominated them as "Incredible", Appendix B, p. 21a.

While the Kohler charges were pending the Kentucky Bar Association, for reasons unknown to the Petitioner, solicited affidavits from County Judge Carl Nunnelley of Harrison County and John Keith, Harrison County Attorney; (T.C., Vol. VI, p. 468, q. 9; p. 476, q. 8-9); the Honorable John P. Lair, Judge of the Eighteenth Judicial District (T.C., Vol. VI, p. 570, q. 8-9); G. L. Tucker, Commonwealth Attorney of the Eighteenth Judicial District; Charles Cox, County Attorney of Nicholas County (T.C., Vol. VI, p. 638, q. 1-2; p. 639, q. 5) and Floyd Clark, County Judge of Nicholas County (T.C., Vol. VIII, p. 763). None of these gentlemen admitted to having made any complaint against Getty until asked for it.[2]

As a result of Kohler's slander and the affidavits solicited by the Kentucky Bar Association the two complaints were filed three months apart. They came on for hearing before a Committee composed of the Honorable Rodney S. Bryson, the Honorable Richard S. Nelson, and the Honorable Robert E. Wohlwender, all experienced and

2. The ten counts of the two complaints are set forth verbatum in the Report of the Trial Committee, Appendix B, pp. 32a-36a.

respected trial attorneys, on the 27th day of November, 1973. In sessions which lasted for three days, some times into the night, forty-two witnesses were heard by the tribunal. The transcript of the proceedings consists of one thousand forty-seven pages. In addition, as is shown by their remarks during the course of the hearings, the Trial Committee had read the sixteen hundred twenty-eight pages of the trial testimony in the Getty, Morgan, Hilander and Kohler proceedings, all of which were introduced into evidence.

Over one dozen affidavits from public officials and attorneys were filed in the record testifying to Kohler's bad reputation for truth and veracity and to Getty's good reputation for the same. A number of witnesses, including a Circuit Judge, a County Judge, two County Attorneys, a Police Judge, and various members of the Bar, testified before the Trial Committee to the same effect and to Getty's ordinary good behavior in court.

James J. Varellas, an attorney practicing in Fayette County, testified that at a time when Kohler was in jail on a non-support charge and Getty was still in California, Kohler had made the same remarks to him concerning Judge Mitchell Meade of the Fayette Circuit Court, that Getty was accused of fabricating in the Complaint.

The Trial Committee concluded that it did ". . . not believe Lance Kohler". Unbelieveably three of

the twelve members of the Board of Governors voted to convict Getty on these charges. However, the Court of Appeals itself deemed them "incredible".

The other four charges of the second complaint, denominated by the Trial Committee, as VII through X, and by the Court of Appeals as Counts I-IV of Charge II, produced widely varying and sometimes heated testimony. Not only were the witnesses for the Kentucky Bar Association contradicted by Getty and the witnesses appearing for him, but they impeached themselves and each other upon occasion.

In the Harrison County Court case styled *Commonwealth* vs. *Campbell,* the Petitioner was accused, during his representation of the Defendant, Campbell, at a trial on March 27, 1973, of calling County Attorney John M. Keith, a "damn liar" on two occasions out of the presence of the jury. He was also charged with disregarding instructions of the Court, badgering and harrassing a witness, and pointing his finger at the Court in a disrespectful and threatening manner.

The Court found Getty guilty of contempt and sentenced him to six hours in the Harrison County Jail. It was the transcript of Getty's appeal to the Harrison Circuit Court, which was heard by the Court sitting without a jury, which was stipulated into evidence before the Trial Committee by the Petitioner and the Kentucky Bar Association.

The second charge of the second complaint accused Getty during his representation of the Defendant Morgan, on or about October 6, 1973, of being continually reprimanded by the Court for his arrogant, abusive attitude; for continually interrupting the Commonwealth Attorney in his presentation of the Commonwealth's case, of refusing to listen to objections made by the Commonwealth Attorney, of becoming abusive towards the Nicholas County Attorney, Charles Cox, and of harrassing and being abusive to the Commonwealth Attorney, G. L. Tucker.

The third charge of the second complaint stated that Getty during his representation of the Defendant, Hilander, at an examining trial in the Nicholas County Court, on December 11, 1972, attempted to disrupt the court proceedings which resulted in an admonishment from County Judge Floyd Clark concerning his decorum. He was also accused of becoming so abusive to State Police Detective Charles Seay in the County Judge's office, during a recess, that a physical fight nearly resulted.

The last charge of the second complaint concerned a dispute which allegedly took place between one Nancy R. Lyons, Secretary to Nicholas County Attorney, Charles Cox, over a transcript of testimony which Getty had engaged her to take at the examining trial in *Commonwealth* vs. *William*

Hilander, Jr., in the Nicholas County Court. Getty was charged with having accused Lyons of not having propertly transcribed her notes and of being influenced in her transcription by County Attorney Cox.

The Petitioner categorically denied all of the charges, except that he hired Mrs. Lyons and that she would not turn over the transcript until she was paid. He presented witnesses, present in the courtrooms in question upon the occasions mentioned in the charges, or produced testimony upon cross-examination from the witnesses for the Kentucky Bar Association, which established his innocence of any conduct calculated to bring the bench and bar into disrepute. R.C.A. 3.130, Appendix A, pp. 3a-4a. The evidence will be discussed in more detail under Reasons For Granting The Writ.

The Trial Committee concluded with regard to the Campbell trial incident that while Mr. Getty's conduct may have substantiated a contempt ruling, his actions were not so outrageous that he should be brought up on charges before the Bar Association. It ruled that the allegations contained in the second and third counts of the second charge, denominated as VIII and IX by the Trial Committee, were not supported by a preponderance of the evidence, and further, that the evidence heard pertaining to charge IX was extremely contradictory. As to the last

count of the second charge the Trial Committee concluded that the allegations, even if they had been supported by a preponderance of the evidence, were not calculated to bring the bench and bar of Kentucky into disrepute, Appendix B, pp. 38a-49a.

Although the Court of Appeals refers to "Getty's Arguments on Appeal . . . in its opinion, Appendix B, 19a," he in fact took no appeal. The Trial Committee completely exonerated him. The Board of Governors had found him guilty of only part of count I of the second charge and had acquitted him on all the allegations made in the first complaint and in count II, III and IV of the second complaint. It recommended a suspension of one month.

No appeal is provided for under the Rules of the Court of Appeals. R.C.A. 3.410, Appendix A, pp. 9a-10a, provides that upon the making of a determination of guilt by the Board of Governors, the Court issues a rule to the accused to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. Twenty days is allowed for a response.

The Petitioner filed a response asserting that the Trial Committee had heard the evidence of the witnesses and concluded that the Kentucky Bar Association had failed to establish its case against Getty by a preponderance of the evidence and had recommended that the charges against him be

dismissed. The Petitioner argued that in construing R.C.A. 3.330, Appendix A, p. 6a, the Court of Appeals had determined that the criteria of proof required to support disciplinary action was a preponderance of the evidence. *Kentucky Bar Association* v. *Lewis,* Ky. 1955 282 S.W. 2d 321. Therefore, since the findings of the Trial Committee were supported by substantial evidence and were not clearly erroneous, they should be sustained.

The Petitioner argued that since the testimony was highly contradictory, since there was no agreement, even among witnesses for the Kentucky Bar Association, which could establish facts with sufficient certainty to be ruled upon as a matter of law; since the resolution of the variances in testimony depended upon the credibility of the witnesses, and since the Board of Governors had not heard or personally observed them it was not competent to override the Trial Committee. The Petitioner further maintained that the Board of Governors was not in a position, not having heard the evidence, to make a qualitative and subjective judgment as to what extent the testimony of the witnesses appearing against him might have been influenced by personal dislike arising out of conflict of personality. Therefore, he asserted that the action of the Board of Governors was arbitrary, capricious, discriminatory, unlawful, illegal and a denial of his rights.

In his response the Petitioner also raised the question that the Board of Governors had not stated any reasons for disagreeing with the Trial Committee or made any separate findings. Getty maintained that due process, fairness and justice required that such should have been done.

The Petitioner also proposed that since the Board of Governors had only found him guilty of a portion of one out of ten charges it was unfair to assess the entire costs of the proceedings against him. He citèd the case of *Kentucky State Bar Association* v. *Taylor,* Ky. 1972, 482 S.W. 2d 574, where after finding that Mr. Taylor was guilty of approximately one-half of the charges the Court of Appeals held that he should only pay fifty percent of the costs.

At this point in the proceedings the Petitioner had taken no issue with the holding of the Court of Appeals that it was the final arbiter of the facts, as set forth in *Kentucky Bar Association* v. *Stivers,* Ky. 1972, 475 S.W. 2d 900. In that case there was little or no disagreement as to the facts and the main question was their legal effect. The issue of creditability was not involved.

The Petitioner believed that the Court of Appeals was stating in the Stivers' case that it would be the final judge of whether or not a fact was established by a preponderance of the evidence or that the conclusion of a lower hearing officer was

supported by substantial evidence. He did not understand it to mean that the Court was going to make a judgment of the credibility of witnesses, or the weight to be given to their testimony, solely from the transcribed page.

The Petitioner was stunned when the Court of Appeals released its opinion finding him guilty on all four counts of the second charge, denominated by the Trial Committee as VII through X. He filed a Petition for Rehearing in which it was stated in his argument.

> "I. The interpretation of the Court of its role as the 'ultimate arbiter' of the facts deprives the Respondent of his rights under the First, Second, Seventh, Eleventh, Fourteenth and Seventeenth sections of the Constitution of the Commonwealth of Kentucky and under the Fifth, Sixth, Seven and Fourteenth Amendments to the Constitution of these United States of America."

The opinion of the Court of Appeals states: "Getty was continually reprimanded by the Court for interrupting the Commonwealth's Attorney in the presentation of the Commonwealth's case." Appendix B, pp. 24a. This reference is to the case of *Commonwealth* v. *Morgan* in the Nicholas Circuit Court. The Transcript of Evidence in that case had been accepted by the Court of Appeals in a direct appeal of Morgan's conviction, had been stipulated

into the evidence before the Trial Committee by the Kentucky Bar Association and Getty, was not impeached, and was ruled by the Trial Committee to be the best evidence of what occurred during the trial.[3]

The record shows only two occasions upon which Mr. Getty interrupted Mr. Tucker. On the first occasion Mr. Tucker, as explained by Mr. Rubel Williams, the foreman of the jury and present in the courtroom, had apparently finished his examination of a witness and Mr. Getty commenced his. When informed that Mr. Tucker was not in fact through he apologized. (Morgan, p. 81). On the only other occasion when the same thing happened he again apologized. (Morgan, p. 85). The only objection that he made during Mr. Tucker's closing argument was sustained. (Morgan, p. 149).

This testimony was transcribed by Mrs. Gayle McCarty, the official reporter of the Eighteenth Judicial District for many years. It shows that when the Commonwealth Attorney asked the Defendant's wife as to living together with him prior to their

3. Where the Court of Appeals and Board of Governors held no hearings of their own, the role of the Trial Committee is that of a Trier of Facts, and not that of a mere investigator whose action is merely advisory under R.C.A. 3.360 (d), Appendix B, pp. 7a-8a. Willner v. Committee on Character and Fitness, 373 U.S. 96, 102, 104, 83 S.Ct. 1175, 10 L.ed. 2d 224, 229, 230 (1963).

marriage, Mr. Getty objected, and the Court instructed the jury to disregard the question. (Morgan, p. 85, q. 4). The question was asked again of another witness by the Commonwealth Attorney a few minutes later despite the Court's admonition. (Morgan, p. 105-106, q. 25).

The record also shows that Getty addressed the Court courteously, for instance, "Thank you, your honor" (Morgan, p. 5); "I withdraw the objection" (Morgan p. 43, q. 13); "If your honor please, that is where I differ with the Court, with due respect to the Court. I seem to think . . ." (Morgan, p. 75-76); and "Sorry your honor". There are numerous instances of Mr. Getty's accepting of a ruling by the Court without argument, and no instance of disrespect to the Court. (Morgan, p. 21, q. 40-41; p. 21-22, q. 45-46; p. 25-26, q. 81-83; p. 26; p. 27-28; p. 38; p. 46; p. 48, q. 12; p. 52, q. 45; p. 59; p. 78-79, q. 10; p. 84, q. 13; p. 106, q. 28; p. 124, q. 2; p. 125, q. 3; p. 133; and p. 67, q. 12). The Honorable John P. Lair, a distinquished jurist, who controls his courtroom with a firm hand, stated that Mr. Getty had never been contemptuous or he would have been in jail. (T.C., Vol. VI, p. 493-494). He said there had never been an act of contempt in his Court by Mr. Getty. (T.C., Vol. VI, p. 503-504, q. 2-3).

Judge Lair also has a hearing disability. (T.C., Vol. VI, p. 495). However, he heard enough to say that Getty's conduct was not calculated to bring the

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bench and the bar into disrepute. (T.C., Vol. IV, p. 12, q. 5). This opinion that Getty was not abusive was concurred in by Joseph F. Connelly and William Hopkins, Carlisle, Nicholas County, attorneys, and by Beulah Hughes, Nicholas Circuit Court Clerk. (T.C., Vol. VIII, p. 730, 743, 746).

The Petitioner objected to the Court having disregarded and gone behind the unimpeached record. He stated that such procedure deprived him of due process.

Getty also pointed out to the Court of Appeals the many areas in the law in which it had refused to disturb the findings of an administrative hearing officer, of a fiscal court in a zoning matter, or of a trial judge, where the opinion of the Trier of Fact was supported by substantial evidence or was not clearly erroneous. He reminded the Court that this was especially true when the matter of credibility or weight must be determined.

The Petitioner respectfully suggested to the Court of Appeals that it would be unfair to afford the applicant for a liquor license the protection of having the testimony of opponents weighed in the light of their demeanor while testifying and to deny the same protection to any attorney. He asserted to the Court that it was not in a position, from having observed the witnesses, to determine whether or not the descriptive language used by them in regard to Mr. Getty, although true to them in their belief,

was chosen and used by them because of certain personal dislike or animosity.

The Court of Appeals could not have observed one of the attorneys from the Eighteenth Judicial District, who appeared on behalf of the Complainant against Mr. Getty, shaking his finger within three or four inches of the end of the nose of one of Mr. Getty's counsel, while at the same having a flushed countenance and speaking in a very forceful manner. It may have appeared to the members of the Trial Committee that his ire was directed at Mr. Getty's counsel. This was in fact not true, since he was discussing a third party, who had nothing to do with the hearings, and the witness was not in the slightest degree angered at counsel. The members of the Committee could not have failed to compare this gentleman's own vigorous behavior with his description of the events that had occurred between him and Mr. Getty.

These matters were brought to the Court's attention in support of Mr. Getty's argument that equal treatment under the law is a right to which attorneys as well as other citizens are entitled. Obviously, attorneys are being denied equal protection of the laws by the Court of Appeals of Kentucky if all other parties in both civil and criminal actions are entitled to have the credibility of witnesses determined by a Trier of Fact, who observes the witnesses, and an attorney is denied this right.

The Petitioner also argued to the Court of Appeals in his Petition for Rehearing, since he had no notice prior to the opinion of the Court that it would be necessary for him to do so, that the delegation to the Court of Appeals in Kentucky Revised Statutes, Chapter 30, Appendix A, pp. 2a-3a, of the power to regulate the practice of law was a deprivation to him of due process and equal protection of the law under the Constitution of these United States of America. He maintained to the Court of Appeals that the statute contained no standards against which the conduct of an attorney might be measured to determine if he should be disciplined for improper behavior. Nor did it contain any safeguards to insure that attorneys undergoing disciplinary procedures would receive due process and equal protection under the law.

Finally in his Petition for Rehearing Mr. Getty attacked the imposition of all of the costs of the proceedings upon him as execssive and as depriving him of due process and equal protection of the law under the Constitution of these United States of America. He had made both written and oral motions for separation between the Kohler and the other charges. Several months before the Trial Committee hearings J. J. Varellas, an attorney, heard of Kohler's charges against Mr. Getty. He volunteered information that in December, 1970, before Getty returned from California to resume the practice of law in Kentucky and undertook Kohler's

representation, Kohler had told Varellas that he could not get a fair trial, on a non-support charge, from Judge Mitchell Meade because of difficulty over a young woman. The assertion that Getty had fabricated this story constitutes counts I and II of the charges made in the May 3, 1973, complaint. Mr. Varellas prepared an affidavit to such effect which was forwarded to the Kentucky State Bar Association, together with a request that the charges be reinvestigated and dismissed.

Mr. Getty had previously filed a number of affidavits of judges and lawyers to the effect that his reputation for veracity was good and Kohler's was bad. The requested reinvestigation was never made.

Mr. Getty also argued that to impose all the costs upon him was discriminatory. In *Kentucky State Bar Association* v. *Taylor*, Ky. 1972, 482 S.W. 2d 574, 574, the Court stated:

> "The Trial Committee was of course more familiar with the case than the Govenors of the Bar Association and we were favorably impressed by its analysis and recommendations. Since, however, the members of the Committee saw violations in some instances (such as counts seven and eight) where we hold there was none, it seems appropriate that the recommended disciplinary action be modified to scale. It is therefore our judgment that the Respondent be publically reprimanded and suspended from the

privilege of practicing law in this state for a period of six months.

The foregoing disposition obviates consideration of Point 6 (that the recommended punishment is disproportionately great) and leaves only the question of costs. It is our judgment that fifty percent of the costs of the proceedings be taxed against the Respondent."

Prior to the rendering of the opinion of January 17, 1975, which found the Petitioner guilty on all four counts of the second charge and imposed a six months suspension from the practice of law upon him, he had no notice that the federal questions, not raised in his response, would be raised by the actions of the Court of Appeals. Therefore, his Petition for Rehearing was his first opportunity, as to these other issues, to bring his rights under the Constitution of the United States to the attention of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER AN ATTORNEY IS DEPRIVED OF DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THESE UNITED STATES OF AMERICA WHEN A STATE COURT OF LAST RESORT, WITHOUT GIVING THE ACCUSED A HEARING BEFORE IT UPON THE CONTROVERTED MATTERS, SUBSTITUTES ITS OWN OPINION AS TO THE CREDIBILITY OF CONFLICTING WITNESSES, WHICH OPINION IS SOLELY BASED UPON A WRITTEN TRANSCRIPT, FOR THAT OF THE TRIER OF FACT AND SUSPENDS THE ATTORNEY FROM THE PRACTICE OF LAW.

A. The Court of Appeals has taken upon itself the functions of a Trial Judge in Bar disciplinary cases without having the personal observation of witnesses which protects the accused from prejudice.

Credibility is a quality or state of being worthy of belief or acceptance. Websters Third New International Dictionary, G. C. Merriam Company, Springfield, Massachusetts, 1966. It has been generally accepted that the tone of voice, the inflection, the complexion, whether flushed or not, the physical carriage, whether tensed or not, and other aspects of demeanor which are apparent to an observer are of great importance in assessing the truthfulness of a witness, his possible prejudice, or the weight to be given to his testimony.

In discussing the Kohler charges in its opinion the Court of Appeals mentions with approval the application by the Trial Committee of the standards enunicated by it in the case of *In Re Hargis,* Ky. 1945, 190 S.W. 2d 333, 334-335, which was a disciplinary proceeding against an attorney. These standards were:

> "In general, the veracity of witnesses is to be determined by (1) their appearance on the stand, and their character insofar as their character bears upon the question of their probable willingness to lie; (2) the evidence or non-evidence of a motive for falsification; and (3) the collateral undisputed facts bearing upon the intrinsic probability of truth or falsehood of the testimony given."

It then proceeds to totally disregard its own admonition. Appendix B, pp. 20a-21a.

The Trial Committee did not have to disbelieve that the honorable men who appeared before it felt that they were telling the truth to acquit the Petitioner. The testimony against Getty consisted of value judgments. The charges are replete with the words "badgering", "harrassment", "loud and boisterous", and "abusive".

Loudness of voice, repetition without rephrasing, attitude and demeanor are characteristics and expressions of personality about which men can honestly differ. If a witness obviously has a strong

personal dislike for or personality clash with an individual about whose conduct he is stating a judgment then his opinion is likely to be influenced by his personal feelings. The voice of a person disliked may be considered to be loud or disrespectful simply because of the source from which it originates, rather than because its volume is actually great or its tone and inflection disparaging.

It should be noted that none of the judges or prosecuting attorneys in the three cases out of which the charges arose made any voluntary complaint to the Bar Association against Mr. Getty. Only one of the three judges, all of whom had spent many years upon the bench, charged Getty with contempt. The evidence would have justified the Trial Committee in believing that this one citation resulted from Getty's inexperience and his ineffectual attempts to rephrase his questions so that evidence favorable to his client might be adduced in an admissable manner.

B. The many inconsistencies in the testimony of the witnesses before the Trial Committee make personal observations especially necessary to a determination of credibility in this case.

Mr. John Keith denied that he had made any unpleasant remarks towards Mr. Getty on the day of the Campbell trial in Harrison County. (T.C., Vol. VI, p. 452, q. 39). He specifically denied

making any remark to Mr. Getty about the latter having been run out of some place. (T.C., Vol. VI. p. 459, q. 22). Judge Carl Nunnelley, Harrison County Judge, stated that in the Harrison County Clerk's Office, prior to the trial, when he did not believe Mr. Getty had previously met Mr. Keith and he introduced them, Mr. Keith made a remark to Mr. Getty about being run out of some other place. (T.C., Vol. V, p. 383-384, q. 10).

Both Mr. Keith and Judge Nunnelley stated that when the trial commenced and a jury was selected Mr. Getty had objected to Mr. Keith's stating out loud that the Commonwealth accepted the first six jurors called, rather than returning a jury list to the Court. His grounds were that people who knew that Mr. Getty had struck them from the jury might be prejudiced against him or a future client at some time when they were recalled upon a panel. In this discussion, which took place out of court and out of the hearing of the jury, Mr. Keith and Judge Nunnelley both testified that Mr. Keith stated that this was the way they had always done it in the thirty-one years that he had been County Attorney. (T.C., Vol. V, p. 382-383, q. 7). Since Mr. Getty had never appeared in the Harrison County Court before it seemed somewhat odd that he would have called Mr. Keith a "damn liar" about something about which Mr. Getty could have had no knowledge. It is more reasonable that Mr. Getty called Mr. Keith a "damn liar" when Mr. Keith

said that Mr. Getty had been run out of Georgetown. (T.C., Vol. X, p. 901-902, q. 120-123).

Judge Nunnelley contradicted himself. He stated that he sustained an objection by the Commonwealth ". . . on one or two occasions . . ." (Getty, p. 23). He said that he had admonished Getty on one or more occasions and that ". . . if I had said thirty it would probably be ten or twenty short . . ." (Getty, p. 26). Later he testified ". . . it could have been thirty, it might have been twenty, it might have been fifteen . . ." (Getty, p. 31). He recited that only on one occasion did Mr. Getty's behavior amount to contempt. (Getty, p. 23-30). Judge Nunnelley stated at another time that Getty was admonished on three or four occasions in the morning that he was not following the rules of the Court. (T.C., p. 373). He said that the Petitioner was warned as to his possible contempt on one occasion in the morning and again in the afternoon. (T.C., p. 373-374).

Mr. Keith, although reversing their order from harrassing and haranguing to haranguing and harrassing, used the same words to describe Mr. Getty's conduct as had been used in the joint affidavit of Judge Nunnelley and Mr. Keith, prepared by Mr. Keith. (T.C., Vol. V, p. 375; p. 399, q. 28; p. 401, q. 33; Vol. VI, p. 446, q. 23). He also gave the impression that continuous objections were made by him to questions asked by Mr. Getty and that Mr. Getty continuously ignored the rulings

of the Court sustaining such objections. (Getty, p. 44-45; p. 52-55). Judge Nunnelley stated that he had sustained Mr. Keith's objections twice prior to declaring a mistrial. (Getty, p. 28) Mr. Keith also stated that only on one occasion did Judge Nunnelley admonish Getty. (Getty, p. 46, q. 21).

Getty was attempting to question Trooper John E. Conley of the Kentucky State Police as to his qualifications to administer a breathalyzer test when the contempt was ruled. (T.C., Vol. V, p. 389, q. 25). Evidently the harrassing and harranguing was being repetitious and loud. (T.C., Vol. V, p. 375; p. 399, q. 28; p. 401, q. 33; Vol. VI, p. 451, q. 35; p. 456, q. 8-11). Judge Nunnelley has a hearing problem which requires attorneys to speak up. (T.C., p. 436-437, q. 1-2) The Harrison County Courtroom is 178 inches wide. (Getty, p. 35-36, Exhibit "A").

The Reverend Curtis Jones, a minister of the Kentucky Christain Conference, was present in the Courtroom. He did not consider Mr. Getty's conduct and demeanor toward Judge Nunnelley to be in any way disrespectful or contemptuous. (Getty, q. 134, q. 15-16). He testified that Mr. Getty gestured with his hands (T.C., Vol. VII, 564, q. 26), but that he did not think that Mr. Getty could have gotten within a foot of the Judge's face. (T.C., Vol. VII, p. 571, q. 42; p. 578-579, q. 1-3).

Reverend Jones' wife did not see Mr. Getty doing anything wrong. (T.C., Vol. VII, p. 621).

Neither did Ralph Beckett and Alex Coleman, both members of the jury in the Campbell trial. (Getty, p. 125, 126, 127, 129). Trial Committee Report, Appendix B, pp. 43a-44a.

Mr. Keith would frequently tell the witness that he did not have to answer a question asked by Mr. Getty. The latter would then ask Judge Nunnelley to let him rephrase the question. (T.C., Vol. VII, p. 562, q. 19; p. 583, q. 13-18). Judge Nunnelley testified that there was a lot of "hassling" between Getty and Keith (T.C., Vol. V, p. 374). He also described Keith as being vociferous. (T.C., Vol. V, p. 374). In spite of Mr. Keith's denial that he talked loud or bickered with Mr. Getty (T.C., Vol. VI, p. 459, q. 24-25), Judge Nunnelley said that Keith raised his voice to the Court, (T.C., Vol. V, p. 382, q. 5); that there was a lot of arguing back and forth between counsel (T.C., Vol. V, p. 405, q. 47-49); and that it was necessary for the Court to admonish Keith. (T.C., Vol. V, p. 405, q. 50).

Mr. Charles Cox, County Attorney of Nicholas County, stated in the affidavit solicited by the Bar Association that during the examining trial in *Commonwealth* vs. *Hilander* in the Nicholas County Court, Mr. Getty had pointed his finger in the face of Detective Charles Seay of the Kentucky State Police. He corrected this in his testimony by stating that in fact Seay was pointing his finger at Getty (T.C., Vol IX, p. 779), a fact which Seay admitted. (T.C., Vol. IX, p. 791, q. 11).

The only other basis upon which the Court of Appeals could have found that Getty was abusive towards a witness during a recess would be the testimony of Officer Seay. For reasons that will become apparent, Mr. Getty did not want Detective Seay, at the conclusion of his testimony, to go into the room where the other witnesses were segregated. (T.C., Vol. IX, p. 799-780). He followed Seay to tell him that Judge Clark wanted him to return to the courtroom. (T.C., Vol. IX, p. 804, q. 8). Detective Seay is a somewhat violent man. He shook his finger at Mr. Getty who said that if Seay continued to do so he would bite it off. Officer Seay advised him that if he did it would be on the end of Officer Seay's fist as it went down Mr. Getty's throat. (T.C., Vol. IX, p. 791, q. 11; T.C., Vol. X, p. 931-935, q. 25; T.C., Vol. IX, p. 804-805, q. 8, p. 806-807, q. 16-21).

When Officer Seay had commenced to testify Mr. Getty had objected to any testimony by the Detective as to admissions made by the Defendant and as to evidence seized, upon the grounds that the interrogation and search were illegal. This motion to supress was overruled. (Hilander, p. 9-10). Officer Seay was then questioned by the Petitioner as to the manner of his interrogation of the Defendant, Hilander, and as to the search. He said that when he stopped Hilander and his companion, Sams, he advised them of their Mirandi Rights. (Hilander, p. 10).

Seay later said that he advised them of their rights at the Carlisle, Nicholas County, Police Station. (Hilander, p. 13). He refused Getty's request to check his records and report back to the Court Reporter when he had taken Hilander into custody. (Hilander, p. 12). Judge Floyd Clark, Judge of the Nicholas County Court, then ordered Seay to do so. (Hilander, p. 13). It appeared from the testimony of Officer Earl C. Finch that Hilander had been stopped about eleven o'clock in the morning. (Hilander, p. 43). Officer Seay had not placed him under arrest until 6 p.m. (Hilander, p. 14).

Officer Seay testified that Chief Earlywine of the Carlisle Police and two other officers were present when he advised Hilander of his rights. (Hilander, p. 10 and p. 15). Chief Earlywine said he was not present. (Hilander, p. 27).

Seay said that he was not familiar with Mirandi Warning Cards or Waiver Cards. (Hilander, p. 15). Officer Adams testified that Seay and Hilander signed a Waiver Card, (Hilander, p. 37), and that Seay read his rights off of a card. (Hilander, p. 42).

Chief Earlywine testified that Seay asked all the local officers to stay outside while he questioned Hilander. (Hilander, p. 35). Officer Adams stated that Detective Seay called him back in while he read Hilander's right to him. (Hilander, p. 36).

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Officer Fitch testified that Officer Seay read Hilander his rights in the hall when he was first brought in. (Hilander, p. 42). He also said that Seay read the Mirandi Warning to Hilander. (Hilander, p. 45).

Officer Seay is evidently a man of some temper. Besides his statements to the Petitioner, Chief Earlywine testified, when asked if Seay kicked Sams, that Seay had only kicked the table when he became displeased with something Sams had said. (Hilander, p. 34). It is obvious why the Petitioner did not want Detective Seay to go into the room where the segregated witnesses, who had not yet testified, were waiting.

Judge Clark felt that both attorneys had gotten emotional. (T.C., Vol. VIII, p. 751-753, q. 11). He described both attorneys as being loud. (T.C., Vol. VIII, p. 757, q. 24; p. 768, q. 19) He also described Mr. Cox as has having hammered on his desk during the course of the hearing. (T.C., Vol. VIII, p. 769, q. 27). He did not cite either attorney for contempt.

The Court of Appeals totally ignored the transcript of the Morgan trial and the testimony of the presiding Judge that Getty had not been in contempt. It found him guilty of being continually reprimanded by the Court for his arrogant, abusive attitude; of continually interrupting the Commonwealth's Attorney in the presentation of the

Commonwealth's case; and of refusing to listen to objections made by the Commonwealth's Attorney, in spite of the fact the record and the testimony of the Trial Judge show this not to be true and that the transcript of testimony at the Morgan trial had been stipulated into evidence before the Trial Committee by the Kentucky Bar Association.

Mr. G. L. Tucker, the Commonwealth Attorney for Harrison and Nicholas Counties, swore in his affidavit to the Bar Association that Getty was shaking Mr. Cox by the lapels during the noon adjournment of the Morgan trial when he intervened. (Compare T.C., Vol. VII, p. 590 and 599). Mr. Cox said that he had no memory of Mr. Getty touching him. (T.C., Vol. VII, p. 644, q. 18). At that time the Commonwealth Attorney had hit Getty with his shoulder and knocked him three or four feet. (T.C., Vol. X, p. 924-926).

Getty testified that he followed Cox and Tucker to the open door of Cox's office to tell Tucker not to shove him any more. Getty's testimony was verified by other witnesses. (T.C., Vol. VIII, p. 680, q. 19; p. 680-681, q. 22; p. 697-698; p. 706-707, q. 1-3; p. 682, q. 29).

In spite of the fact that he is contradicted by the transcript, the Commonwealth Attorney, called the Petitioner arrogant and abusive. (T.C., Vol. VII, p. 586, q. 5-6; p. 587, q. 13). Mr. Rubel Williams, the foreman of the jury in the Morgan trial, who

had served on at least twenty juries in the Nicholas Circuit Court, testified that Mr. Tucker was as loud as Mr. Getty. (T.C., Vol. VIII, p. 668, q. 14); that the jury didn't think that Mr. Getty showed lack of respect for the Court (T.C., Vol. VIII, p. 669, q. 15); that Mr. Getty was not discourteous (T.C., Vol. VIII, p. 669, q. 16); and that the jury heard nothing of the difficulty at the noon recess (T.C., Vol. VIII, p. 675, q. 2-7).

The transcript of testimony in the Morgan case stipulated into evidence by the Kentucky Bar Association and by the Respondent, was not impeached and is the best evidence of what occurred during the trial. To disregard it and go behind the unimpeached record deprived the Petitioner of due process.

C. The Court of Appeals of Kentucky has not conformed to the rulings of this Court, and of many others, that disbarment proceedings are quasi-criminal in nature.

The Court of Appeals continues to state that disbarment is a civil action. Much of its reasoning is based on its conclusion that criminal safeguards are not needed in these civil matters. *Commonwealth Ex Rel Buckingham* v. *Ward,* 267 Ky. 627, 103 S.W. 2d 117 (1937); *Louisville Bar Association* v. *Hubbard,* 282 Ky. 734, 139 S.W. 2d 773 (1940).

As early as 1868, in *Ex parte Bradley,* 74 U.S. 364 (7 Wall. 364) 19 L. Ed. 214, this Court held that in disbarment proceedings attorneys may not be punished for offenses not specified in a rule to show cause. In *Ex parte Robinson,* 86 U.S. 505 (19 Wall. 505) 22 L. Ed. 205 (1873), it was ruled that an attorney is entitled to notice of the grounds of the complaint and the opportunity to be heard before being disbarred.

More recently this Court reaffirmed its earlier decisions that an attorney is entitled to procedural due process, including fair notice of the charge and the opportunity for explanation and defense. It stated that disbarment proceedings are quasi-criminal in nature and referred to In re: *Gault,* 387 U.S. 1, 33. In re *Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 2L. Ed. 2d 117, reh. denied 390 U.S. 961, 88 S. Ct. 1833, 20 L. Ed 2d 874 (1968). *Spevack* v. *Cline,* 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) held that the refusal of an attorney to produce demanded financial records or to testify in a judicial inquiry on the basis that the records and testimony world tend to incriminate him was not grounds for disbarment.

State statutes which infringe upon constitutional rights under the guise of regulation were condemned in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405, 418 (1963), where the Court said that the objectionable quality

of vagueness and overbreadth does not depend upon the absence of fair notice to one accused of a crime or upon unchannelled delegation of legislative powers, but on the danger of tolerating a penal statute susceptible of sweeping or improper application in the area of First Amendment freedom. *Polk* v. *State Bar of Texas,* 374 Fed. Supp. 784, (N.D. Texas 1974), rev. on other grounds 480 F. 2d 998 (5th Cir. 1975), held that a private citizen does not give up his right to freedom of expression when he becomes a licensed attorney. It said at page 788 "where the protections of the Constitution conflict with the efficiency of a system to insure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform."

Many states now consider disciplinary actions, while not fully criminal in character, to be "penal proceedings", the results of which may permanently cripple an attorney's standing and reputation in the community. *Florida Bar* v. *Quick,* Fla. 1973, 279 So. 2d 4. It is accepted that "the right to practice law (implemented through a license) is a constitutionally protected right and no attorney can be deprived of this right by suspension or otherwise without strict adherence to basic constitutional principals of procedural due process." *Louisiana State Bar Association* v. *Ehmig,* La. 1973, 277 So. 2d 137.

Some states also disagree with the Court of Appeals of Kentucky that a mere preponderance of

the evidence is sufficient to find an attorney guilty of unprofessional conduct and subject to discipline. They hold that the clear and convincing evidence necessary to sustain a referee's finding of guilty is more than the mere preponderance of the evidence sufficient for a civil action, although not as stringent as required in criminal actions. *Florida Bar* v. *Quick,* Fla. 1973, 279 So. 2d 4.

Other courts of last resort have not attempted to usurp the functions of the Trier of Fact where the credence to be given to the testimony of a witness is an issue in a disciplinary proceeding. They hold that the reviewing court must give great weight to the Committee's findings in view of its ability to judge credibility. *Poll* v. *State Bar of California,* Calif. 1974, 528 P. 2d 35; *Bluestein* v. *State Bar of California,* Calif. 1975, 529 P. 2d 599; In re: *Hallett,* Ill. 1974, 319 N.E. 2d 48; In re: *Clay,* S. Car. 1974, 209 S.E. 2d 561.

The Kentucky Court of Appeals denies attorneys the equal protection of the law extended to all other citizens in administrative proceedings, to a party in a child custody case, and in all other areas of the law. It deems itself more fit to determine the credibility of witnesses, or their possible prejudice, from the written page than a panel of distinguished attorneys who heard forty-two witnesses produce one thousand forty-seven pages of testimony over a three day period. Other courts, in resolving a

conflict in testimony in disciplinary proceedings, give the hearing court's findings in support of its recommendations the same force and effect as those contained in a master's report in equity. They are considered to be prima facie correct and will not be disturbed unless determined to be clearly erroneous, not supported by substantial evidence, or arbitrary and capricious. *Bar Association of Baltimore* v. *Marshall,* Md. 1973, 307 A. 2d 677; In re: *Estes,* Mich. 1973, 212 M.W. 2d 903; In re: *Johnston,* Wash. 1974, 524 P. 2d 593; In re: *Clay,* S. Car. 1974, 209 S.E. 2d 561; In re: *Bowen,* Idaho 1973, 508 P. 2d 1240.

The Trial Committee found from the testimony before it that it was evident that the attorneys were emotionally involved during the Morgan trial. They further found it to be evident that these strong feelings carried over during the noon recess. Appendix B, p. 44a. Certainly feelings between the parties which might have created prejudice or colored their testimony would have been more evident to the Trial Committee than to the Court of Appeals proceeding from a written record.

The Trial Committee could also have easily become aware from the atmosphere during the hearing that among public officials who have long held office in a county or district a certain clanishness or self-supportive relationship often develops. All of the charges of which the Court of

Appeals found Mr. Getty guilty arose out of two counties of one judicial district.

A Circuit Judge, a County Judge, a Police Judge, two County Attorneys, and a number of members of the Bar appeared to testify as to Mr. Getty's veracity and as to his ordinary and customary demeanor in the Courts of the Fourteenth Judicial District where he regularly practices. Others appeared but were not allowed to testify after the Trial Committee determined that it was not going to hear any further evidence with regard to Mr. Getty's general behavior in Court.

Observing the testimony of the witnesses the Trial Committee could have become aware of passion and prejudice which might not have been evident to the Court of Appeals in weighing the testimony against Mr. Getty. One witness testified that when Getty went to see Mr. Keith to apologize if he had offended him, and to repeat his offer to apologize to Judge Nunnelley, if Judge Nunnelley had thought that he had shown him disrespect, that Mr. Keith was cursing when talking to Mr. Getty, told him that he had taken up too much time in the Campbell case, and for Getty not to get smart or he would knock his block off. The witness described Mr. Keith's behavior as "pretty rough". (T.C., Vol. VIII, p. 717-718)

D. The Board of Governors and the Court of Appeals at no time afforded the Petitioner an opportunity to be heard before either of them upon the merits of the controversy which the Court of Appeals asserts it alone had the power to determine.

Pursuant to the Rules of the Court of Appeals, R.C.A. 3.230, Appendix A, p. 5a, the Trial Committee was appointed to hear the evidence upon the charges against Petitioner and to report their Findings of Fact, Conclusions of Law and Recommendations to the Board of Governors. R.C.A. 3.360, Appendix A, pp. 7a-8a.

The Trial Committee heard the cause and filed their Findings of Fact, Conclusions of Law and Recommendations with the Board of Governors. These were that the charges against the Petitioner were not supported by a preponderance of the evidence and should be dismissed.

Without giving Mr. Getty an opportunity to be heard and, presumably reviewing the 2,675 pages of evidence in the record, as well as other matters, in a two day meeting, the Board of Governors found him guilty of part of Count one of Charge II and recommended a one month suspension. This was without argument, without a hearing, without affording the Petitioner an opportunity to be heard, and without stating any reason to the Petitioner for rejecting the finding of acquittal made by the Trial

Committee. Therefore, when the show cause order was issued by the Court of Appeals, the Petitioner had no explanation given to him of why the Board of Governors differed with the Trial Committee. Naturally, he only responded to the unsupported finding of the Board of Governors.

Without notice to Mr. Getty that it intended to go into matters not raised by the recommendation of the Board of Governors, and without giving him the opportunity to present argument or be heard, the Court of Appelas resurrected charges on which he had been acquitted by both the Trial Committee and the Board of Governors and found him guilty thereon. The first opportunity that he had to answer was in his Petition for Rehearing which was summarily denied without explanation. This is in spite of the fact that the opinion misquoted the finding and recommendation of the Board of Governors, ignored the transcript of the Morgan trial and ignored the transcript of the Hilander trial.

The opinion of the Court states in part "The Board of Governors considered the Trial Committee's report, reviewed the record and recommended to this Court a finding of not guilty on all counts except count one of the second charge. On that count, the Board of Governors recommended a finding of guilt and stated:. . ." Then follows a word for word recitation of the charge. The Board of Governors had not so stated but had merely set forth that it

adjudged him guilty on the second complaint filed August 2, 1973, ". . . With the exception that the Board of Governors concurred with the Trial Committee that the facts alleged in Paragraphs II, III, and IV, and the first literary sentence in Paragraph I of the August 2, 1973, charge are not sustained by the evidence . . ." Appendix B, pp. 29a, 31a.

The first sentence of Paragraph I of the August 2, 1973, charge includes the recitation that Getty called John M. Keith a "damn liar" on two occasions. The opinion of the Court, including a repetition of this statement, was reported at length in newspapers, in Paris, Kentucky, the county seat of Bourbon County, where Getty resides, and in the Lexington papers, which receive distribution throughout most of the State of Kentucky. It was also quoted in an editorial in the Kentucky Bar Journal. Appendix B, pp. 10a-11a.

Although these errors were pointed out to the Court of Appeals in Getty's Petition for Rehearing no revision of the opinion was made. The only revision which took place was the issuance of a "corrected copy" of the mandate of April 28, 1975, which was issued on May 6, 1975. It raised the suspension from one month to six months.

There is no question that the power to disbar or suspend resided in the Court of Appeals as a court, was not delegated and could not be delegated.

K.R.S. 30.170. Appendix A, pp. 2a-3a, 7a-9a. The hearings before the Trial Committee were not hearings before the Court. The arguments presented to the Trial Committee were concerned with what their findings and recommendations should be, and not with what the ultimate disposition of the cause by the Court should be.

The proceedings subsequent to the recommendation of the Board of Governors were directed to responding solely thereto. The brief filed in connection with the show cause order could not properly be regarded as the equivalent of a hearing by the Court of Appeals upon the merits prior to the entry of judgment.

In no sense did the Court of Appeals ever have the merits of the cause before it until Getty's Petition for Rehearing was filed with it. ". . . It is apparent that that Court at no time afforded the Petitioner 'an opportunity to be heard before it upon the merits of the controversy which it alone had power to determine.' " In re: *Noell,* 8th Cir. 1937, 92d F. 2d 5, 7.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER KENTUCKY REVISED STATUTES 30.170, GRANTING THE COURT OF APPEALS THE AUTHORITY TO REGULATE THE PRACTICE OF LAW, IS SO LACKING IN ANY STANDARDS OR PROCEDURAL SAFEGUARDS AS TO MAKE ITS EFFECTS SO UNCERTAIN AS TO DENY ATTORNEYS DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THESE UNITED STATES OF AMERICA, AS WELL AS PERMITTING THE COURT OF APPEALS TO ENACT RULES SUSCEPTIBLE OF SWEEPING AND IMPROPER APPLICATION LIMITING FIRST AMENDMENT FREEDOMS.

Kentucky Revised Statute 30.170 (1) (c) gives the Court of Appeals authority to adopt and promulgate laws "c. Establishing practice and procedure for disciplining, suspending and disbarring attorneys;". It further provides "(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict." Appendix A, pp. 2a-3a.

Pursuant to this authority the Court has promulgated R.C.A. 3.130 which states: "The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional Conduct required of the members of the Bar, and the Board may cause to be tried all

charges brought under this Code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.." Appendix A, 3a-4a.

Pursuant to the authority of K.R.S. 30.170 and an alleged inherent power to discipline the legal profession the Court of Appeals has claimed for itself the right to determine the credibility of witnesses, without hearing or observing those witnesses, the right to disregard the Findings of Fact and Conclusions of Law of the Trier of Fact, and the right to re-institute charges of which an accused attorney considers himself to have been acquitted, without notice to the attorney or affording him a hearing before it upon the merits. Mr. Justice Black has probably stated most succinctly the guiding principle which should be adopted by all courts of last resort when he said ". . . Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *Frank* v. *United States,* 395 U.S., 147, 160, 89 S. Ct. 1503, 23 L. Ed. 2d 162, reh. denied 396 U.S. 869, 90 S. Ct. 34, 24 L. Ed. 2d 123.

It has been held that a private citizen does not give up his right to freedom of expression when he becomes a licensed attorney. State Bar action against an attorney for comments to the news media critical of a judge would violate his First Amendment rights in his capacity as a private

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citizen. *Volk* v. *State Bar of Texas,* N.D. Texas 1974, Fed. Supp. 784, 788. Attorneys have constitutional rights under the First and Fourtheenth Amendments. *N.A.A.C.P.* v. *Button,* 371 U.S. 414, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) They are also private citizens who have the right to make a fair comment on public officials. *New York Times* v. *Sullivan,* 376 U.S. 254, 277, 84 S. Ct. 710, 11 L. Ed. 686, 704.

The Court of Appeals believes that some statements, such as Getty calling Keith a "damn liar" out of the courtroom, would bring the bench and bar into disrepute under R.C.A. 3.130, regardless of the reason why they were made. Such statements are constitutionally protected speech under the First and Fourtheenth Amendments. Therefore, R.C.A. 3.130 and the statute authorizing it are constitutionally overbroad and invalid on their face. As was said in *N.A.A.C.P.* v. *Button,* U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405, 418 (1963): "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application."

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER THE SUSPENSION OF THE PETITIONER WAS SO LACKING OF A RATIONAL BASIS IN THE EVIDENCE AS TO BE ARBITRARY AND DISCRIMINATORY AND THUS A DENIAL TO HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Trial Committee participated extensively in the hearing. The members conducted their own examination of the witnesses, in addition to that undertaken by counsel for the parties. They were thus able to determine for themselves any prejudice which might have affected the opinions of the witnesses for the Kentucky Bar Association.

The Trial Committee noted that neither Judge John P. Lair or Judge Floyd Clark had cited Getty for contempt in the Morgan and Hilander cases, respectively. Neither they nor Judge Nunnelley had instituted charges against him with the Bar Association. Nor had Mr. John Keith, Mr. Charles Cox, or Mr. G. L. Tucker. Appendix B, pp. 42a, 45a, 47a.

The Trial Committee found the evidence to be conflicting; that during some of the alleged incidents all parties were emotionally involved; that neither Judge Lair nor Judge Clark felt that Getty's courtroom conduct warranted contempt action and that at least one informed, disinterested layman believed that Mr. Getty conducted himself in Court just as an attorney should. In summary the Trial

Committee, all experienced trial attorneys, did not believe that Getty's conduct was calculated to bring the bench or bar into disrepute; that Getty is a very persistent individual and one who is not afraid to "rock the boat" if he believes it is in the best interest of his client; that most of the allegations made against Getty were not supported by a preponderance of the evidence; that the evidence pertaining to some charges was extremely contradictory; and that the best evidence of what transpired in the Morgan and Hilander hearings was the transcript of testimony of those hearings.

This Court has held that suspension of an attorney is a denial of due process and equal protection of the laws because such suspension is both arbitrary and discriminatory unless there is evidence in the record which rationally supports the holding. *Konigsberg*, v. *State Bar of California*, 353 U.S. 252, 262, 77 S. Ct. 722, 1 L. Ed. 2d 810, 819 (1957) It cannot be said that the Court of Appeals in ignoring the transcript of evidence of the Hilander and Morgan trials, the recommendations of the Trial Committee which had the witnesses under close scrutiny for three days, the contradictions in the testimony of the individual witnesses, or between their testimony and their affidavits, the impeachment of County Attorney John M. Keith by Judge Carl Nunnelley, the impeachment of Commonwealth Attorney G. L. Tucker by County Attorney Charles Cox, the impeachment of Detective

Seay by several members of the Carlisle Police Force, the impeachment of many of the witnesses for the Kentucky Bar Association by members of the juries sitting in the trials or laymen present in the courtroom, the fact that three members of the Board of Governors voted to convict Getty on the Kohler charges when the Trial Committee did not believe him and the Court of Appeals itself found them "incredible", and the fact that a Circuit Judge, a County Judge, two County Attorneys, a Police Judge, and numerous members of the Bar from Getty's home district appeared to testify in his behalf, found a rational basis for its conclusion in the testimony of a small group of men, practically all public officials used to working together over a period of years, and coming from two adjoining counties.

In a case concerning whether or not this Court should disbar an attorney before it on the basis of a state court action this Court enunciated a principle which should be applied in reviewing whether or not attorneys have received due process in disciplinary proceedings. It stated in part ". . .2, That there was such an infirmity of proof as to facts found to have established the want of a fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion of that subject; . . ." *Selling* v. *Radford*, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917).

IV. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER THE IMPOSITION OF ALL THE COSTS OF A DISCIPLINARY PROCEEDING, AMOUNTING TO OVER TWO THOUSAND DOLLARS, UPON AN ATTORNEY ACQUITTED OF ALL CHARGES BY THE TRIER OF FACT, FOUND INNOCENT OF NINE OUT OF TEN CHARGES BY THE BOARD OF GOVERNORS OF THE BAR ASSOCIATION, AND FOUND INNOCENT OF SIX OUT OF TEN CHARGES BY THE COURT OF LAST RESORT, DEPRIVES HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

The Petitioner's motions for a separation between the Kohler and the other charges should have been sustained in view of Kohler's status as convicted felon and the affidavit of James J. Varellas, an attorney at law, that Kohler had made the same remarks to him, which Getty was accused of fabricating, at a time before Getty returned to Kentucky from California. The Kentucky Bar Association did not even make a new investigation of Kohler's charges after the affidavit of Mr. Varellas was filed with it.

In his response to the show cause order the Petitioner requested an allocation of the costs. On page fourteen of its brief the Kentucky Bar Association stated as a basis for imposing all of the costs upon Getty "ramifications into the economic structure of the Bar Association".

The Court of Appeals sustained this payment in spite of the fact that it denied equal protection of the law to the Petitioner. Previously the Court of Appeals had ruled that recommended disciplinary actions be modified to scale. In a case where the accused was not found guilty upon all counts it ordered that he be taxed with only fifty percent of the costs of the proceedings. *Kentucky State Bar Association* v. *Taylor*, Ky. 1972, 482 S.W. 2d 574, 584.

CONCLUSION

The Trial Committee in its opinion, Appendix B, p. 44a, stated that it was quite common for attorneys to become emotionally involved in their cases "The trial of any case, and especially a criminal case, is an adversary hearing. The friction generated in the area of battle usually does not cool at the courtroom door."

The Court of Appeals has recognized this fact itself. Chief Justice Palmore speaking of lawyers as fighters in the pit of police and criminal courts made a sound recommendation. "But when the rules are loosely couched in terms of high principals, as are the Canons, there is room for difference of opinion, hence the distinct possibility that they do not provide sufficiently explicit 'no trespassing' signs for those who may approach the invisible line of proscription. For this reason, if no other, simple

justice dictates that at arriving at a final determination all doubts be resolved in favor of the Respondent." *Kentucky State Bar Association* v. *Taylor,* Ky. 1972, 482 S.W. 2d 574, 582-583.

It may be impossible to construct a uniform code of conduct to be observed in the many jurisdictions within this nation. However, in an era when many lawyers pass from the courts of one jurisdiction to those of another on a regular basis, it is extremely important that they know, in order that the vigorous representation to which their clients are entitled will not be muted, that if they should run afoul of a local clique, or an antagonistic judge, that they will receive due process of the law and equal protection of the law in regard to any charges that may be brought against them.

For the reasons set forth herein a Writ of Certiorari should be granted to review the Judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

RAYMOND FRANCIS CONNELL
326 Main Street
Paris, Kentucky 40361
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served upon the Respondent by mailing post paid a true and correct copy thereof to the Honorable Ed W. Hancock, Attorney General of the Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, and to the Honorable Leslie Whitmer, Director, Kentucky Bar Association, 243 State Capitol Building, Frankfort, Kentucky, 40601, and the Honorable Harris C. Rhodes, 907 Lancaster Street, Stanford, Kentucky, 40484, Attorneys for the Kentucky Bar Association, this the 21st day of July, 1975.

Raymond Francis Connell

Raymond Francis Connell

APPENDIX

APPENDIX "A"

UNITED STATES CONSTITUTION

AMENDMENT 1

[Religious and political freedom.]—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the povernment for a redress of grievances.

* * * * *

AMENDMENT 5

[Criminal actions—Provisions concerning—Due process of law and just compensation clauses.]—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

AMENDMENT 14

§ 1. [Citizenship—Due process of Law—Equal protection.]—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

KENTUCKY REVISED STATUTE

30.170. Court rules governing practice of law and state bar.—(1) The Court of Appeals shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a

part of the judicial department of the state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form of its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party. (101-1, 101-2: amend. Acts 1952, ch. 213; 1956, ch. 116; 1962, ch. 5.)

* * * * *

RULES OF THE COURT OF APPEALS OF KENTUCKY

RULE 3.130 ABA CODE OF PROFESSIONAL RESPONSIBILITY RECOGNIZED AS AUTHORITY

The Court recognizes and accepts the principles embodied in the American Bar Association's Code of

Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for the other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

RULE 3.140 APPOINTMENT OF INQUIRY TRIBUNAL

Annually, the Chief Justice shall appoint a former judge or commissioner of the Court or a former circuit judge, a past-president of the Association, and a former chairman of the House to serve as members of an Inquiry Tribunal. One member shall be designated chairman and each shall possess the qualifications and appropriate powers of a circuit judge under a commission from the Chief Justice. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it pursuant to RCA 3.170.

RULE 3.150 PROCEEDINGS NOT PUBLIC; EXCEPTION

Nothing connected with a disciplinary case shall be made public unless ordered by the Court.

RULE 3.160 INITIATION OF DISCIPLINARY CASES

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(b) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

* * * * *

RULE 3.230 PROCEDURE WHEN ANSWER RAISES ISSUES OF FACT

If the answer raises any issue of fact the Inquiry Tribunal shall notify the Chairman in order that he may appoint an attorney to represent the Association and a Trial Committee composed of three members of the House, one of whom shall be designated Chairman, possess the qualifications of a Circuit Judge and be so commissioned by the Chief Justice. The Director shall immediately notify each member of his appointment and furnish each with a copy of the pleadings.

* * * * *

RULE 3.330 ORDER OF PROCEEDINGS AND BURDEN OF PROOF

The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

* * * * *

RULE 3.340 INTRODUCTION AND ADMISSIBILITY OF EVIDENCE, EVIDENCE TAKEN IN OTHER PROCEEDINGS

The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceedings may be used as evidence in any hearing or in any investigation antecedent to or in connection with any disciplinary case involving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

* * * * *

RULE 3.360 TRIAL COMMITTEE TO FILE REPORT WITH BOARD

When a disciplinary proceeding has been finally submitted, the Trial Committee shall promptly file with the Board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of findings of fact and conclusions of law, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Committee deems proven by a preponderance of the evidence, the Committee's conclusions; and

(d) its recommendations as to the disposition of the case.

The Trial Committee's report shall constitute a part of the record in the case. The report shall be advisory.

RULE 3.370 BOARD'S ACTION ON TRIAL COMMITTEE'S REPORT

Upon receipt of the report of the Trial Committee the Board shall promptly consider and act upon the entire record. Only the President, the President-elect, the Vice President and the fourteen duly elected members of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case.

The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is

final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action, and the Director shall mail copies of such order together with a copy of the Trial Committee's report to the parties or their counsel and to each member of the tribunal. If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of, the proceedings shall be filed with the Clerk. Any recommendation to the Court that disciplinary action be taken shall be advisory.

* * * * *

RULE 3.410 PROCEDURE IN THE COURT

Promptly upon the filing of the order as provided in RCA 3.370, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days after service of the rule, requiring the respondent to show cause why he should not be adjudged guilty of

unprofessional conduct and disciplined therefor. When the respondent is proceeded against by warning order, the rule shall be deemed to have been served thirty days after the date of the making of the warning order. If response is not filed when due the Court shall enter judgment against the respondent, adjudging him guilty of unprofessional conduct and disciplining him. When a response is filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding, including those certified under RCA 3.370. If he files his response in forma pauperis no bond shall be required.

* * * * *

Editorial

The Lawyer Image

The public image of the lawyer took a nose dive with Watergate. The image was on the decline with circus antics of so called "defenders of unpopular causes".

Recently the Kentucky Court of Appeals in a disciplinary case, condemned flamboyant forensics in the court room. The respondent, in that case, had

called the County Attorney a damned liar on two occasions, paid no attention to the rulings of the Judge, badgered and harrassed a witness, was loud and boisterous, accused the Court of attempting to influence the jury against the client, and "pointed his finger at the Court in a threatening and disrespectful manner".

If we, as advocates, are to honor the law, surely our conduct in the public court room must demonstrate good manners, courtesy and etiquette as more than a mere matter of form.

No longer shall a "conviction of contempt" be sufficient disciplinary action. Surely a client's cause can be adequately espoused in a gentlemanly manner. Certainly the court room should not be a one ring circus. The Television Court Room has influenced too many young men being admitted to the Bar.

It is time to remember that a lawyer is an officer of the Court.

Chairman,
Bar Journal
Committee

Kentucky Bench and Bar
Vol. 39, No. 2 April, 1975

APPENDIX "B"

Mandate

75 Term — January 17, 1975

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

Kentucky Bar Association

Vs.

Richard J. Getty

Appeal from a judgment of the
In Court of Appeals
Circuit Court

It is therefore ordered that the respondent, Richard J. Getty, be and he is hereby suspended from the practice of law in this Commonwealth for a period of six months, after which time he may apply for reinstatement as provided by RCA 3.510.

It is therefore considered that the respondent is further ordered to comply with RCA 3.390.

It is further ordered that respondent be required to pay the cost in this proceeding.

A copy—Attest:

FRANCES JONES MILLS, C.C.A.
By /s/ Frances Jones Mills, D.C.
Issued April 28, 1975 (Corrected Copy Issued May 6, 1975)

* * * * * * *

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION — COMPLAINANT

VS.

RICHARD J. GETTY — RESPONDENT

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE

On motion of the respondent a stay of execution and enforcement of this Court's mandate is granted for a period to and including August 29, 1975, in order that respondent may make application to the Supreme Court of the United States for Writ of Certiorari.

Any additional requests for stay deemed necessary should be addressed to the Supreme Court of the United States.

ENTERED May 2, 1975.

/s/ Pleas Jones
Acting Chief Justice

* * * * * * *

MANDATE

75 Term — January 17, 1975

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

Kentucky Bar Association

Vs.

Richard J. Getty

Appeal from a judgment of the
In Court of Appeals
Circuit Court

It is therefore ordered that the respondent, Richard J. Getty, be and he is hereby suspended from the practice of law in this Commonwealth for a period of one month, after which time he may apply for reinstatement as provided by RCA 3.510.

It is therefore considered that the respondent is further ordered to comply with RCA 3.390.

It is further ordered that respondent be required to pay the cost in this proceeding.

A copy—Attest:
FRANCES JONES MILLS, C.C.A.
By /s/ Frances Jones Mills, D.C.

Issued April 28, 1975

RESPONDENT'S PETITION FOR REHEARING DENIED — 4/25/75

* * * * * * *

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR
ASSOCIATION COMPLAINANT

V.

RICHARD J. GETTY RESPONDENT

O R D E R

Respondent's petition for rehearing is denied without prejudice to his right to proceed by motion for a stay of the order of this court in order to proceed with an appeal, or to proceed with an application for a writ of certiorari, to the Supreme Court of the United States of America.

Entered this 25th day of April, 1975.
Full court sitting. All concur.

/s/ Scott Reed
Scott Reed, Chief Justice

* * * * * * * *

Rendered: January 17, 1975

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY
BAR ASSOCIATION COMPLAINANT

V.

RICHARD J. GETTY RESPONDENT

PER CURIAM

This disciplinary matter is before the court on a recommendation that Richard J. Getty be suspended from the practice of law in this state for a period of one month, and that he pay the costs of this action.

A charge was filed against Getty by the Kentucky Bar Association on May 3, 1973, consisting of six counts relating to his conduct as defense counsel in the case of Commonwealth of Kentucky v. Lance Kohler, Fayette Circuit Court. On August 2, 1973, an additional charge was filed against Getty. This charge consisted of four counts relating to Getty's conduct as defense counsel in the cases of Commonwealth v. Campbell, Harrison County Court; Commonwealth v. Morgan, Nicholas Circuit Court; and Commonwealth v. William Highlander, Jr.,

Nicholas County Court. On August 2, 1973, the Inquiry Tribunal ordered the two charges consolidated to be tried as a single disciplinary action. RCA 3.260. Getty filed responses to each of the charges.

A three-man trial committee appointed by the President of the Kentucky Bar Association conducted hearings in which Getty and his counsel participated. The trial committee found Getty not guilty on all charges and recommended to the Board of Governors of the association that all counts, on both charges, were not proven by a preponderance of the evidence and should be dismissed.

The Board of Governors considered the trial committee's report, reviewed the record, and recommended to this court a finding of not guilty on all counts except count 1 of the second charge. On that count, the Board of Governors recommended a finding of guilt and stated:

> "In the Harrison County Court case styled Commonwealth v. Campbell, Richard J. Getty, during his representation of the defendant Campbell at trial on or about March 27, 1973, called County Attorney John M. Keith a 'damn liar' on two occasions out of the presence of the jury. After repeated admonishment of County Judge Carl Nunnelley regarding respondent's remarks and attitude toward witness State Trooper John Conley continued his badgering

> and harrassment of witness Conley. After the noon recess, respondent attempted to use a chart or card which indicated the amount of alcoholic beverage a person of a certain size could use without being under the influence of alcohol. Respondent laid no foundation for the introduction of the card into evidence. Under the repeated objection to the introduction of said evidence by County Attorney John M. Keith, respondent continued his badgering and questioning in a loud and boisterous manner, completely ignoring the court and accused the court of attempting to influence the jury against respondent's client. During this latter event, respondent pointed his finger at the court in a very disrespectful and threatening manner after being admonished by the court to desist. Respondent's conduct during the trial caused the court to declare a mistrial and find respondent in contempt of court for his boisterous haranguing and contemptuous attitude toward the court."

Getty's arguments on appeal are:

1. The findings of the trial committee as to all charges were supported by substantial evidence and conclusive of his innocence.

2. The recommendation of the Board of Governors should be set aside because it failed to submit separate findings of fact and conclusions of law contrary to those of the trial committee.

3. The costs should be fairly apportioned.

4. His conduct was not such as to warrant punishment.

5. The Board of Governors erred in permitting counsel for the Kentucky Bar Association to be present at their meeting when Getty's counsel was not permitted to be present or heard.

This court has reviewed the 10 volumes of evidence heard by the trial committee and considered by the Board of Governors. The charge against Getty consisting of six counts relating to his conduct as defense counsel for Kohler in the Fayette Circuit Court is not supported by substantial evidence. The record is clear that the primary witness for the Kentucky Bar Association was Lance Kohler. The trial committee found that the evidence in the first six counts in the complaint was a swearing contest between Getty and Kohler. It noted that Kohler is a disbarred attorney, presently serving a sentence in the penitentiary for the sale of narcotics. In its findings of fact concerning Getty's representation of Kohler, the trial committee applied the standards enunciated by this court:

> "In general, the veracity of witnesses is to be determined by (1) their appearance on the stand, and their character insofar as their character bears upon the question of their probable willingness to lie; (2) the evidence or non-evidence of a motive for falsification; and

> (3) the collateral undisputed facts bearing upon the intrinsic probability of the truth or falsehood of the testimony given." In re Hargis, Ky., 190 S.W.2d 333 (1945).

This court deems it unnecessary to dwell upon the incredible testimony of Lance Kohler. The trial committee did not believe him. The Board of Governors found his testimony lacking. This court concurs in these findings. The allegations contained in Counts I through VI of Charge 1 were not established by a preponderance of the evidence. Therefore the action of the trial committee and the Board of Governors as to these counts was correct and this court concurs in the recommendations of the Board of Governors by a vote of 9-3 that Getty "be adjudged not guilty on the provisions of the charge filed May 3, 1973."

Before proceeding to consider the other charges against Getty, this court reaffirms its position with respect to the roles of a trial committee and the Board of Governors in a disciplinary proceeding.

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to

an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." Kentucky State Bar Association v. Stivers, Ky., 475 S.W.2d 900 (1972).

Count No. I of Charge 2 concerned the conduct of Getty in his representation of Alvin Campbell in the Harrison County Court. Campbell was charged with operating a motor vehicle while intoxicated. The trial committee complacently referred to the incident of Getty's calling the County Attorney a damned liar on two occasions as "lawyer to lawyer argument" and "if every attorney who said these words to another attorney was charged, we would all be respondents." The trial committee placed this inicdent in the same category as the gag which says: Two lawyers castigate each other. The one calls the other an unmitigated liar. The other retorts, "you're an idiotic scoundrel." Whereupon the judge says, "now that the attorneys have identified each other, let's proceed with the case."

This court does not view the conduct of Mr. Getty so lightly. On that occasion Getty not only called the County Attorney a damned liar on two occasions, but his conduct toward the County Judge was reprehensible. Getty paid no attention to the rulings of the judge. He badgered and harrassed a witness. He was loud and boisterous. He accused the court of attempting to influence the jury against his

client. He approached the bench, and within a very short distance from the judge pointed his finger at the court in a threatening and disrespectful manner. Getty's conduct during the trial caused the court to declare a mistrial. The judge found Getty in contempt for his boisterous and contemptuous attitude.

Such misconduct as shown by Getty and his bad deportment give the profession of law a bad image. There is no place in any courtroom for such flamboyant forensics. No attorney should show such calloused disregard and lack of respect for a presiding judge. Any attorney should know that good manners, courtesy and etiquette in the courtroom are more than a matter of form. These are the components which help prevent a trial from deteriorating into a brawl. A lawyer must not be guilty of such conduct which violates the admonition contained in the Code of Professional Responsibility. Conon I, DR 1-102(a)(5),(6). Getty's conduct is in violation of the stated disciplinary rules adopted by this court as a sound statement of the standard of professional conduct required of members of the bar.

The Board of Governors by a 9-2 vote adjudged Getty guilty of unprofessional conduct on Count I of Charge 2 and recommended that he be suspended from the practice of law in Kentucky for a period of one month and required him to pay the costs of this action. The Board of Governors concurred in the

findings of the trial committee as to Count Nos. II, III and IV of Charge 2.

Count II. Getty was charged with unprofessional conduct in the Nicholas County Circuit Court during his representation of the defendant, Morgan, on October 6, 1972. The evidence reveals the same pattern shown in Count I. Getty was continually reprimanded by the court for interrupting the Commonwealth's Attorney in the presentation of the Commonwealth's case. At the noon recess he was abusive toward the County Attorney. He followed the Commonwealth's Attorney into the County Attorney's office and grabbed him by the left shoulder. The trial committee, in its findings of fact as to this charge, stated: "It appears to the committee that the general demeanor of all counsel, both in and out of the court room, was one of antagonism toward each other. Further, the testimony indicates that in this section of the state such conduct is the norm and is somewhat expected." This court is of the opinion that such is not the norm. If it is, the norm will have to be upgraded. Getty's conduct on this occasion is not conducive to the efficient administration of justice, and such action when called to the attention of this court will not be tolerated.

Count III. Getty was charged with unprofessional conduct during his representation of William Highlander in the Nicholas County Court. The

evidence reveals the same pattern of conduct on the part of Getty as was shown on Charges I and II. He attempted to disrupt the court proceedings and was admonished by the County Judge. During a recess, Getty became abusive toward a witness.

Count IV. Getty accused the court reporter of not properly transcribing her notes in the Highlander case. He also accused the County Attorney of Nicholas County of influencing the transcription of her notes.

Plato wrote in 400 B.C., in *The Laws:*

". . . If justice be noble, how can we deny that pleading is a noble thing."

If a lawyer truly fulfills his role as an adovcate, he can then measure up to that famous toast by Daniel Webster:

"The Law: It has honored us; may we honor it." Getty's misconduct in the courtroom indicates that he failed to honor the law. He failed to measure up to the rules required of him.

Getty's argument that irregularities occurred in the conduct of the proceeding by the Board of Governors in permitting counsel for the Kentucky Bar Association to be present when his attorney was not permitted to be present is refuted by the record. It is established by the record that the Board of Governors adhered to the rules of this court.

This court rejects Getty's contention that the punishment he received from the contempt order was sufficient. Punishment for contempt is not a prohibition of disciplinary proceedings. A prior conviction for contempt adds force to the need for discipline. Getty's contention that the recommendation of the Board of Governors should be set aside because it failed to submit separate findings of fact has no merit. There are no rules of this court that require such action. RCA 3.390.

This court is unanimous in the opinion that the charges contained in Counts I through IV of Charge 2 are sustained by a preponderance of the evidence. The consensus among the members of the court is that Richard J. Getty be suspended from the practice of law in this state for six months and that costs be assessed as provided by RCA 3.450(a) and RCA 3.370.

It is ordered that Richard J. Getty be suspended from the practice of law in this Commonwealth for a period of six months, and he is required to pay the costs of this proceeding.

All concur.

ATTORNEY FOR COMPLAINANT:
Leslie G. Whitmer, Director
Kentucky Bar Association
Capitol Building
Frankfort, Kentucky 40601

ATTORNEYS FOR RESPONDENT:

Raymond Francis Connell
326 Main Street
Paris, Kentucky 40361

Robert J. McDaniel
326 Main Street
Paris, Kentucky 40361

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR
ASSOCIATION COMPLAINANT

V. AMENDMENT TO BOARD ORDER

RICHARD J. GETTY RESPONDENT

* * *

Comes now the Kentucky Bar Association, by counsel, and amends the Order of the Board dated July 20, 1974, to correct an error in the second literary paragraph of the Order to make it conform to the Finding. The second literary paragraph should read:

"On call of the roll, the Respondent was adjudged not guilty as charged by a vote of 9-3 concerning the allegations of the charge filed on May 3, 1973, and guilty on the provisions of the charge filed on August 2, 1973, with the exceptions stated below, by a vote of 9-3. Upon a second roll call, by a vote of 9-2, it was recommended that the Respondent be suspended from the practice of law in Kentucky for a period of one month. Mr. Klette was absent when the second roll call was made."

/s/ Leslie G. Whitmer
Leslie G. Whitmer, Counsel
Kentucky Bar Association
243 State Capitol
Frankfort, Kentucky 40601
Attorney for Complainant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Amendment to Board Order was mailed to Mr. Raymond Francis Connell, 326 Main Street, Paris, Kentucky 40361; Mr. Robert J. McDaniel, 226 Main Street, Paris, Kentucky 40361; and Mr. Richard M. Compton, 100 S. Broadway, Georgetown, Kentucky 40324, Attorneys for Respondent, this 5 day of August, 1974.

/s/ Leslie G. Whitmer
Leslie G. Whitmer, Counsel

* * * * * * *

MEETING
BOARD OF GOVERNORS
JENNY WILEY STATE PARK
PRESTONSBURG, KENTUCKY
JULY 20, 1974

The next order of business concerned the charge against Richard J. Getty. The Trial Committee composed of Robert E. Wohlwender, Chairman; Richard S. Nelson and Rodney S. Bryson having tendered a written Report recommending that the Respondent be adjudged not guilty of unprofessional conduct, on motion duly made, seconded and passed, the Report was ordered filed.

On call of the roll, the Respondent was adjudged guilty as charged by a vote of 9-3 concerning the

allegations of the charge filed on May 3, 1973, and guilty on the provisions of the charge filed on August 2, 1973, with the exceptions stated below, by a vote of 9-3. Upon a second roll call, by a vote of 9-2, it was recommended that the Respondent be suspended from the practice of law in Kentucky for a period of one month. Mr. Klette was absent when the second roll call was made.

IN RE: RICHARD J. GETTY

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and approved and the matter having been fully considered, the following finding and recommendation is made:

FINDING

That the Respondent, Richard J. Getty, be adjudged not guilty on the provisions of the charge filed May 3, 1973, and guilty on the charge filed August 2, 1973, with the exception that the Board of Governors concurs with the trial committee that the facts alleged in Paragraphs II, III and IV and the first literary sentence in Paragraph I of the August 2, 1973, charge are not sustained by the evidence. A motion to allocate costs was rejected.

RECOMMENDATION

It is respectfully recommended to the Court of Appeals of Kentucky that Richard J. Getty be suspended from the practice of law in Kentucky for a period of one month and required to pay the costs in this action.

This July 20, 1974.

/s/ Viley O. Blackburn
Viley O. Blackburn,
President

ATTEST:

/s/ Leslie G. Whitmer
Leslie G. Whitmer, Director

* * * * * * * *

RECEIVED
Jul. 3, 1974
KY. BAR ASSN.

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION — COMPLAINANT

-vs-

RICHARD J. GETTY — RESPONDENT

REPORT OF TRIAL COMMITTEE

STATEMENT OF CHARGES

The initial six charges against the respondent were filed by the complainant on May 3, 1973 and alleged unethical conduct on the part of respondent during the course of representing Lance Kohler on a criminal charge in the Fayette County Circuit Court, Indictment Number 9150, as follows:

I. That respondent in an attempt to file a Motion to remove Circuit Judge N. Mitchell Meade from the bench in the case, drafted and presented to Lance Kohler a false and fraudulent affidavit for Kohler's signature containing statements, invented by respondent, which would be embarrassing to the presiding Judge. Kohler refused to sign the affidavit.

II. That respondent, in an attempt to force and coerce Judge Meade to vacate the bench, in closed chambers confronted Judge Meade with false statements allegedly made by Kohler, but invented by respondent, concerning Judge Meade which would embarrass the Judge. The statements were not made by Kohler to respondent and were misrepresentations invented by respondent.

III. That while in conference with Kohler in the Fayette County Jail, respondent gave Kohler a loaded firearm stating that if Kohler wanted to escape, he could hold the firearm to respondent's head and they would open the front door and let Kohler out. Kohler refused the offer and returned the firearm to respondent.

IV. That while in conference with Kohler on October 4, 1971, respondent informed Kohler that respondent had a brother of a client who was hospitalized in Lexington, Kentucky and respondent was going to call him as a witness for the sole purpose of having Kohler's case continued to a later day.

V. That respondent advised and/or sought to force Kohler to testify that Kohler had called Lexington City Police Officer Thornton five or six times on June 3, 1971 knowing at that time that Kohler had made only one call to Thornton on that day.

VI. That respondent requested Kohler to solicit legal business for him at the place of Kohler's imprisonment to help cover respondent's costs in representing Kohler.

VII. In the Harrison County Court case styled *Commonwealth* vs. *Campbell,* respondent Richard J. Getty, during his representation of the defendant Campbell at a trial on or about March 27, 1973, called County Attorney John M. Keith a "damn Liar" on two occasions out of the presence of the jury. After repeated admonishment of County Judge Carl Nunnelley regarding respondent's remarks and attitude toward witness State Trooper John Conley continued his badgering and harrassment of witness Conley. After the noon recess, respondent attempted to use a chart or card which indicated the amount of alcoholic beverage a person of a certain size could use without being under the influence of alcohol. Respondent laid no foundation for the introduction of the card into evidence. Under the repeated objection to the introduction of said evidence by County Attorney John M. Keith, respondent continued in his badgering and

questioning in a loud and boisterous manner, completely ignoring the court and accused the court of attempting to influence the jury against respondent's client. During this latter event, respondent pointed his finger at the court in a very disrespectful and threatening manner after being admonished by the court to desist. Respondent's conduct during the trial caused the court to declare a mistrial and find respondent in contempt of court for his boisterous, haranguing and contemptuous attitude toward the court.

VIII. In the Nicholas County Circuit Court case of *Commonwealth* vs. *Morgan,* Respondent Richard J. Getty, during his representation of the defendent, Morgan, on or about October 6, 1972, was continually reprimanded by the court for his arrogant, abusive attitude; for continually interrupting the Commonwealth's Attorney in the presentation of the Commonwealth's case; and refusing to listen to objections made by the Commonwealth's Attorney. At the noon adjournment in the small lobby of the courtroom, respondent became abusive toward Nicholas County Attorney Charles Cox who assisted in the prosecution of the Morgan case and accused said Cox of tampering with the witnesses in the case before October 6, 1972. Following this event, respondent followed Commonwealth's Attorney G. L. Tucker into the office of said Cox and continued to harrass and make abusive statements to the Commonwealth's Attorney. During this latter

conversation, respondent grabbed the Commonwealth's Attorney by his left shoulder.

IX. In the Nicholas County Court case styled *Commonwealth* vs. *William Hilander, Jr.*, Respondent Richard J. Getty, during his representation of the defendent, Hilander, at an examining trial on or about December 11, 1972, attempted to disrupt the court proceeding which resulted in an admonishment to respondent from County Judge Lloyd Clark concerning his decorum in the courtroom. At the noon recess the court threatened to discontinue the examining trial completely. During a short intermission in the proceeding, respondent became abusive to State Police Detective Charles Seay in the County Judge's office nearly resulting in a physical fight with the detective.

X. Respondent had engaged the services of Nancye R. Lyons, secretary to the Nicholas County Attorney, to make a transcript at the examining trial in *Commonwealth* vs. *William Hilander, Jr.*, Nicholas County Court. When said Lyons refused to give respondent the transcript until he had paid for the same, respondent subsequently accused Lyons of not having properly transcribed her notes and accused County Attorney Charles M. Cox of influencing her transcription of said notes, both of which accusations are misrepresentations.

STATEMENT OF DEFENSES

As to charges I and II, respondent denies that the incidents involved were created or suggested by respondent, but rather were created and suggested by Kohler and that respondent merely advised Judge Meade of what Kohler wanted to do and what Kohler wanted respondent to do.

As to Charges III, IV, V, VI, VII, VIII and IX, respondent categorically denies same; as to Charge X, respondent admits he hired Mrs. Lyons and that she would not turn over the transcript until she was paid, and denies all other parts of the Charge.

STATEMENT OF PROCEEDINGS

Your Trial Committee met at Lexington, Kentucky, and conducted its hearings November 26, 1973 through November 29, 1973. Forty-two witnesses were heard concerning all charges. Testimony of witnesses and documentary evidence was duly presented by the complainant who was represented by the Honorable Harris C. Rhodes. Testimony of witnesses and documentary evidence was presented by the Honorable Raymond Connell and the Honorable Robert McDaniel on behalf of the respondent. Each party was permitted to cross examine witnesses for the other party, all witnesses were sworn, examination was further conducted by the members of the Trial Committee and closing

statements were made by counsel for the respective parties. A stenographic transcript of the proceedings was made consisting of 1047 pages and was thoroughly reviewed by your Trial Committee. Further, 1628 pages of Trial transcripts introduced into evidence were reviewed.

STATEMENT OF FINDINGS OF FACT

As to Charges I and II, four witnesses' testimony is deemed worth of comment, although the testimony of other witnesses has not been disregarded by the Trial Committee. Lance Kohler must be considered the primary witness for the complainant on these charges, he testified substanially as the charges alleged, and that the incidents described in the charges occurred and are true. It is specifically noted that as to charges III, IV, V and VI, the only evidence pertaining thereto presented by the complainant was and is the testimony of Kohler. The Trial Committee believes that the only relevant evidence concerning charges III and IV by the respondent would be the testimony of the respondent himself. As to those charges, where the only evidence is the testimony of one individual against another individual, the decision of fact as to the truthfulness and the occurrence of the incidents involved in those charges, rests solely upon determination of the credibility of the witnesses.

As to charges I and II, in addition to the testimony of Kohler, the testimony of Judge Meade and the testimony of James J. Varellas, Jr., are determined particularly pertinent. Kohler testified again substantially as the charges alleged. Judge Meade testified that the respondent confronted him with the alleged fact that Kohler wanted to file a false affidavit to force Judge Meade to vacate the bench and further confronted Judge Meade with other false statements in the Judge's chambers allegedly originating with Kohler. Each of these incidents clearly occurred but the question involved in both is not whether they occurred, but whether the idea of the affidavit and the attempt to embarris Judge Meade were Kohler's desire and intent or whether the desire and intent originated with the respondent. Judge Meade did not know the answer to this question, respondent claims the intent and idea was solely that of Kohler and he merely brought it to the Court's attention and Kohler claimed he did not initiate or suggest this and the idea was solely that of respondent.

As to Charges I and II, it initially would appear that again, the decision as to those changes would be one of the credibility of Kohler versus Getty. However, the testimony of James J. Varellas, Jr., bears relevance as to these charges.

At page 140 of the Transcript of Evidence, Kohler testified that he had no knowledge of the Sears

woman whatsoever. This woman becomes important because the alleged attempt to embarrass Judge Meade is based upon a claim that Judge Meade and Kohler were vying for the affections of the Sears woman. Mr. Varellas at Page 231 of his testimony in the Transcript of Evidence stated that Kohler told him that he (Kohler) could not get a fair trial because Judge Meade and Kohler had been seeing the same young lady. This is in direct conflict with the statement of Kohler that he never heard of the Sears woman.

The Trial Committee further notes that Mr. Kohler is a disbarred attorney, is presently serving a sentence in the Kentucky State Penitentiary for sale of narcotics and therefore is a convicted felon (Page 145 of Transcript of Evidence) and has been committed to a mental hospital (Page 144 of Transcript of Evidence).

A number of witnesses testified as to the reputation for truth and veracity of the respondent and of Kohler. In each instance, the respondent was said to have a good reputation for those traits and Kohler had a bad reputation for those traits and Kohler had a bad reputation for same.

Further, a member of the Trial Committee attempted to determine whether Mr. Kohler had any motive for falsifying his testimony with a view toward a possible "1142" motion. At Page 103 of the Transcript of Evidence, Kohler testified that he may

filed an "1142" and then refuse to answer that question on the grounds of self-incrimination. Later, on Page 159 in the Transcript of Evidence, stated he would not file an "1142".

In the case of *In Re Hargis*, Ky., 190 SW2d 33, a disciplinary proceeding against an attorney, the Court of Appeals stated at pages 334-335;

> "In general, the veracity of witnesses is to be determined by (1) their appearance on the stand, and their character in so far as their character bears upon the question of their probable willingness to lie; (2) the evidence or non-evidence of a motive for falsification; and (3) the collateral undisputed facts bearing upon the intrinsic probability of the truth or falsehood of the testimony given."

Applying these standards to the case at Bar, the Trial Committee concludes that it does not believe Lance Kohler. The Trial Committee further finds that except for Kohler's testimony, there is absolutely no other evidence to substantiate charges I through VI.

Your Trial Committee finds, therefore, that the allegations contained in those charges are not proven by a preponderance of the evidence.

As to Charge VII, this portion of the investigation of the Trial Committee delves into the activities of Mr. Getty concerning his representation of one Alvin Campbell in the Harrison Quarterly

Court, on a charge of Driving a Motor Vehicle while Intoxicated.

It was alleged that Mr. Getty practiced the case in such a manner as to constitute unethical conduct and his actions were calculated to bring the Bench and the Bar of Kentucky into disrepute — Mr. Getty denied this.

At the outset, it occurs to the Trial Committee that the actions of Mr. Getty during the Campbell Trial were in a situation which was under the jurisdiction of a Court, and of a judge. Misconduct of the respondent could be, and was, punished by a contempt ruling. It is the obligation of any judge to run his Court in an orderly manner, and said judge has the power to do this. If the Judge of a court uses his powers of contempt, and still feels that additional methods should be utilized, he has every right to institute charges against the offender to the Bar Association. This was not done by this judge, nor the prosecuting attorney, in the Campbell case (Trial Comm. Transcript P. 469). It appears that the County Attorney, Mr. John Keith, was contacted by a spokesman for the Bar Association, and asked to prepare an Affidavit (T.C. 469). He then prepared a joint Affidavit for Judge Nunnelley and himself (T.C. 476).

It is conceivable that an attorneys' course of conduct could be so outrageous in a courtroom that he should be brought up on charges before the Bar

Assoication. It is the opinion of this Trial Committee that Mr. Getty's actions were not of that caliber.

The accusing testimony amounted to this: "Harrassing and haranguing" — "Repetitious" (T.C. Keith, 444, 447, 448); "Argue with judge on rulings" "Shook his finger at Judge" "Loud" (T.C., Connelly, 527, 528, 542): "Judge unable to maintain dignity of Court" (T.C., Connelly, 529); "Loud arguments - threatening - shook finger at Judge" (T.C., Arnold, 606, 607, 608); "Loud, Repetitious, Shook Finger, wouldn't listen to Court rulings" (T.C., Nunnelley, 376, 377, 378)

The respondent's witnesses: "No finger waving, saw nothing wrong, both attorneys loud" (T.C., Curtis Jones, 558, 562, 571); "Didn't see Getty do anything wrong" (T.C. Rosa Jones, 621); (T.C. Campbell, 627).

There was an appeal from the Order of Judge Nunnelley holding Mr. Getty in contempt, and a trial de novo was held in the Harrison Circuit Court. The prosecution put on the same witnesses as were heard by this Trial Committee, except that deputy Sheriff James Haggard testified in the Harrison Circuit Court. "Shook finger at Judge - threatening manner - I stook up, but nothing came of it" (Appeal Transcript, Haggard 74, 75)

Additional respondent witnesses called in the Harrison Circuit Court were: Ralph Beckett and Alex Coleman, both members of the jury in the Quarterly

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Court Campbell case. "No name calling - no threats to Judge" (A.T., Beckett, 125, 126) "Uproar - confusion all involved" (A.T., Beckett 127, 129); No treats - no insults" (A.T., Coleman, 130)

In any event, while Mr. Getty's conduct may have substantiated a contempt ruling, it does not go to the lengths to be punished by the Bar Association, in the opinion of this Committee.

While the Court of Appeals has stated:

> "Frequent and repeated punishment for contempt of Court indicates that lawyer is not fit to practice law."
>
> (Kentucky State Bar Association vs. Daniel Taylor, 1972, 482 SW2d 574).

It appears that respondent herein was cited for contempt but once.

The incident of Mr. Getty calling Mr. Keith a "damned liar", while showing a lack of good taste and a lack of professional detachment (which, it appears, Mr. Getty does lack) can have no place in these proceedings for the following reasons:

1. This was a lawyer to lawyer argument, which occurs often. If every attorney who said these words to another attorney was charged, we would all be respondents.

2. This argument was out of the courtroom and more-or-less in private.

Your Committee concludes that Charge VII has not been proven to be of an extent which should be punished, and should be dismissed.

As to Charge VIII, concerning the Morgan trial and the episode in Mr. Cox's office, your Committee finds that The Honorable John P. Lair, Judge of the Nicholas Circuit Court did not hold respondent in contempt of Court for actions during the trial of said case;

That the testimony is conflicting as to what took place outside the courtroom during the trial of the above action. It is evident from the record in this hearing that the attorneys were emotionally involved. Further, it is evident that these strong feelings carried over during the noon recess. However, the Committee is aware that such conduct is not uncommon. The trial of any case, and especially a criminal case, is an adversary hearing. The friction generated in the area of battle usually does not cool at the courtroom door.

Respondent's conduct is to be measured against the standard of whether his conduct was calculated to bring the bench and bar of Kentucky into disrepute. (3.130).

The testimony of Mr. Tucker and Mr. Cox (p. 649) indicates that respondent's conduct was so calculated. The testimony of Mr. Williams, a somewhat informed, disinterested layman, testified that respondent conducted himself in court, just as

an attorney should (p. 672). Further, Mr. Williams stated that he did not have first hand knowledge of the alleged "shoving" incident between Cox, Tucker and respondent; and, that to his knowledge, no juror had such personal knowledge. (p. 675)

It appears to the Committee that the general demeanor of all counsel, both in and out of the court room, was one of antagonism toward each other. Further, the testimony indicates that in this section of the state such conduct is the norm and is somewhat expected.

Also, the presiding Judge did not hold respondent in contempt of court and as presiding Judge, he is the party who determines what consititutes arrogant and abusive courtroom conduct.

The Committee concludes that the obligations contained in charge number eight are not supported by a proponderance of the evidence and that respondent's conduct was not calculated to bring the bench and bar of Kentucky into disrepute.

As to Charge IX as to the Hilander Trial and Detective Seay episode, your Committee finds all the participating parties agree the respondent is a very persistent individual and one who is not afraid to "rock the boat" if he believes it in the best interest of his client. (p. 752) However, when the question was asked the presiding Judge, Floyd Clark, if respondent's courtroom conduct warranted contempt action, the Judge replied negatively. (p. 768, 773 &

774). Mr. Cox disagreed. (p. 785). In Detective Seay's opinion, the entire court proceeding was unorderly. (p. 796). Mr. Hilander contradicted Detective Seay and testified respondent did not threaten Seay. (p. 805). Mr. Sam's testimony indicates that Judge Clark wanted respondent to tell Seay to return to the courtroom. (p. 818). Chief Earlywine agreed. (p. 824).

The Court did not hold respondent in contempt. (p. 768) As presiding Judge, he certainly could have so acted had he believed it necessary under the circumstances.

The Committee concludes that the evidence heard pertaining to charge number nine is extremely contradictory. However, we conclude that the obligations are not supported by a preponderance of the evidence and further, that respondent's conduct was not calculated to bring the bench and bar of Kentucky into disrepute.

As to Charge X, the Nancye Lyons episode, the Committee deems proven the facts that respondent ordered the transcript for his personal use and that Lyons refused to release it to him until paid. Further, Lyons was paid. (p. 837)

The Committee concludes that a contract was entered into between respondent and Lyons for the preparation of the transcript. Subsequently, a disagreement arose as to it and the manner of payment.

The Committee concludes that the allegations contained in charge number ten, which were denied by respondent, even if supported by a preponderance of the evidence, were not calculated to bring the bench and bar of Kentucky into disrepute.

STATEMENT OF CONCLUSIONS

Based upon the foregoing Statement of Findings of Fact as to charges I through X, your Trial Committee concludes that charges I through X were not proven by preponderance of the evidence and same should therefore be dismissed.

Respectfully submitted,

/s/ Robert E. Wohlwender
Chairman

/s/ Richard S. Nelson
Member

/s/ Rodney S. Bryson
Member

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION — COMPLAINANT

V.

RICHARD J. GETTY — RESPONDENT

* * *

This is to CERTIFY that the Board of Governors of the Kentucky Bar Association has expended the following sums in the above-styled case:

November 27, 1973	Charles A. Wilson	$ 41.90
November 13, 1973	W. R. Dollins	6.00
November 26, 1973	Carlton T. Nay	2.40
November 26, 1973	Webber Davis	5.00
November 30, 1973	Leslie G. Whitmer	65.63
December 4, 1973	Harris C. Rhodes	48.11
December 5, 1973	Robert E. Wohlwender	141.38
January 30, 1974	Richard S. Nelson	138.24
February 6, 1974	Rodney S. Bryson	98.14
March 5, 1974	Betty J. Dobson	1,684.00
March 6, 1974	Mildred Lielke	164.00
	TOTAL	$2,394.80

DATED: July 29, 1974

/s/ Leslie G. Whitmer
Leslie G. Whitmer, Director

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Supreme Court, U. S.
FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-125

RICHARD J. GETTY - - - - Petitioner

Vs.

COMMONWEALTH OF KENTUCKY, EX REL
KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

ROBERTS PRINTING CO., FRANKFORT, KY.

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American Bar Association Report on Disciplinary Enforcement (1970)	14
American Bar Association Code of Professional Responsibility, DR 1-102 (A) (5) (6) (1970)	17

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-125

RICHARD J. GETTY - - - - - - - *Petitioner*

Vs.

COMMONWEALTH OF KENTUCKY, EX REL KENTUCKY BAR ASSOCIATION - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Petition, Appendix, pp. 17a-26a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the disciplinary proceeding of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law, equal

protection of the laws, and protection of his First Amendment rights under the Constitution of the United States?

II. Whether the evidence supports the findings and judgment of the Court of Appeals of Kentucky?

RULES INVOLVED

Kentucky Rules of the Court of Appeals Concerning Procedures in Disciplinary Cases

The pertinent provisions of Rules of the Court of Appeals of Kentucky, RCA 3.140, *et seq.*, are set forth in the Appendix hereto or citations made to the Appendix to the Petition.

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statute 30.170

Petition, Appendix A, pp. 2a-3a

STATEMENT OF THE CASE

A charge was filed against the Petitioner, Richard J. Getty, by the Kentucky Bar Association on May 3, 1973, consisting of six (6) counts relating to Petitioner's unethical and unprofessional conduct as defense counsel in the case of *Commonwealth v. Lance Kohler,* Fayette County Kentucky Circuit Court. An additional charge was filed against Petitioner on August 2, 1973, consisting of four (4) counts relating to Petitioner's unethical and unprofessional conduct as defense counsel in the Kentucky cases of *Commonwealth v. Campbell,* Harrison County Court; *Commonwealth v. Morgan,* Nicholas County Circuit Court; and *Commonwealth v. Hilander, Jr.,* Nicholas County Court. By order of Respondent's Inquiry Tribunal dated August 2, 1973, the two charges were consolidated pur-

suant to the provisions of Rule of the Kentucky Court of Appeals 3.260 (hereinafter referred to as RCA) and ordered tried as a single disciplinary case. (Appendix A, p. 1a). Responses to the charges were duly filed by the Petitioner.

Thereafter, a trial committee of the bar association composed of three attorneys conducted a trial hearing from November 26, 1973, through November 29, 1973. The trial committee in its report to the Board of Governors filed on July 3, 1974, recommended a finding that all counts of both charges were not proven by a preponderance of the evidence and they should be dismissed.

Thereafter, the Board of Governors on July 20, 1974, considered the trial committee's report, reviewed the record and recommended to the Court of Appeals of Kentucky a finding of not guilty on all counts except Count I of the second charge. The Board of Governors recommended a finding of guilt on the count stating:

> "In the Harrison County Court case styled Commonwealth vs. Campbell, Respondent Richard J. Getty, during his representation of the defendant Campbell at a trial on or about March 27, 1973, called County Attorney John M. Keith a 'damn liar' on two occasions out of the presence of the jury. After repeated admonishment of County Judge Carl Nunnelley regarding respondent's remarks and attitude toward witness State Trooper John Conley continued his badgering and harrassment of witness Conley. After the noon recess, respondent attempted to use a chart or card which indicated the amount of alcoholic beverage a person of a certain size could use without being under the influence of alcohol. Respondent laid no foundation for the introduction of the card into evidence. Under the repeated objection to the introduction of said evidence by County At-

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torney John M. Keith, respondent continued his badgering and questioning in a loud and boisterous manner, completely ignoring the court and accused the court of attempting to influence the jury against respondent's client. During this latter event, Respondent pointed his finger at the Court in a very disrespectful and threatening manner after being admonished by the court to desist. Respondent's conduct during the trial caused the court to declare a mistrial and find respondent in contempt of court for his boisterous, haranguing and contemptuous attitude toward the court."

In addition, the Board of Governors recommended to the Court that Petitioner be suspended from the practice of law in the Commonwealth for a period of one (1) month and be ordered to pay the costs of this action. Pursuant to these recommendations, a rule was issued by the court for the Petitioner to show cause why the recommendations of the Board of Governors should not be made absolute. The Petitioner duly filed a response and Respondent filed a reply to the response.

On January 17, 1975, in a Per Curiam Opinion, the Court of Appeals of Kentucky, full court sitting and concurring, found Petitioner guilty on Count I of the second charge set forth above and Counts II, III and IV of the second charge providing respectively:

II.

"In the Nicholas County Circuit Court case of *Commonwealth vs. Morgan,* Respondent Richard J. Getty, during his representation of the defendant, Morgan, on or about October 6, 1972, was continually reprimanded by the court for his arrogant, abusive attitude, for continually interrupting the Commonwealth's Attorney in the presentation

of the Commonwealth's case; and refusing to listen to objections made by the Commonwealth's Attorney. At the noon adjournment in the small lobby of the courtroom, respondent became abusive toward Nicholas County Attorney Charles Cox who assisted in the prosecution of the Morgan case and accused said Cox of tampering with the witnesses in the case before October 6, 1972. Following this event, respondent followed Commonwealth's Attorney G. L. Tucker into the office of said Cox and continued to harrass and make abusive statements to the Commonwealth's Attorney. During this latter conversation, respondent grabbed the Commonwealth's Attorney by his left shoulder."

III.

"In the Nicholas County Court case styled *Commonwealth vs. William Hilander, Jr.,* Respondent Richard J. Getty, during his representation of the defendant, Hilander, at an examining trial on or about December 11, 1972, attempted to disrupt the court proceeding which resulted in an admonishment to respondent from County Judge Lloyd Clark concerning his decorum in the courtroom. At the noon recess the court threatened to discontinue the examining trial completely. During a short intermission in the proceeding, respondent became abusive to State Police Detective Charles Seay in the County Judge's office nearly resulting in a physical fight with the detective."

IV.

"Respondent had engaged the services of Nancy R. Lyons, secretary to the Nicholas County Attorney, to make a transcript of testimony at the examining trial in *Commonwealth vs. William Hilander, Jr.,* Nicholas County Court. When said Lyons refused to give respondent the transcript until he had paid for the same, respondent subsequently accused said Lyons of not having properly

> **transcribed her notes and accused County Attorney Charles M. Cox of influencing her transcription of said notes, both of which accusations are misrepresentations."**

Petitioner was ordered suspended from the practice of law for six months and ordered to pay the costs of the proceeding.

Petitioner filed a Petition for Rehearing in the Court of Appeals of Kentucky on February 13, 1975. Respondent filed a Response to the Petition. On April 25, 1975, the court overruled Petitioner's Petition for Rehearing with the full court sitting. On May 2, 1975, the mandate of the court was stayed by the court to permit Petitioner to make application to this Court for Writ of Certiorari. Petitioner filed his Petition for a Writ of Certiorari in this Court on July 23, 1975. On July 28, 1975, Justice Thurgood Marshall denied Petitioner's application to further stay the mandate of the Court of Appeals of Kentucky.

ARGUMENT

The issues raised by the Petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Court of Appeals of Kentucky in disciplining a member of the Kentucky Bar Association.

Each issue raised by Petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

The constitutional issues raised by the Petitioner in his Petition for Rehearing before the Court of Appeals of Kentucky were whether or not the disciplinary proceeding by the Kentucky Bar Association and the court were conducted in such a way as to deny him rights of procedural due process and equal protection of the laws under the Fifth and Fourteenth Amendments of the United States Constitution. (Petition, Appendix, pp. 1a-2a). The court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved. The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process.

The court has clearly stated this position in its Opinion below:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding. *Kentucky State Bar Association v. Stivers,* Ky., 475 S.W.2d 900 (1972)." (Petition, Appendix, p. 22a).

The Court went on to point out in the *Stivers* opinion:

> "But it must be recognized that its action is nothing more than advisory to this Court. So far

> as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904)
>
> * * * * *
>
> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the Court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board concerning both some recommended findings of fact and recommended discipline.

The constitutional issues raised by Petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law.

Another issue raised by the Petitioner in his brief before the Court of Appeals concerned the evidentiary findings made by the trial committee. This issue was clearly defined by the court upon independent nonfederal grounds. The court held that the report and recommendations of the trial committee and Board were only advisory.

The court in its role as fact finder specifically and unequivocally held:

> "This court is unanimous in the opinion that the charges contained in Counts I through IV of Charge 2 are sustained by a preponderance of the evidence." (Petition, Appendix, p. 26a).

The Petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky.

II.

THE DISCIPLINARY PROCEEDING OF THE KENTUCKY BAR ASSOCIATION AND THE COURT OF APPEALS OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, NOR DENY HIM HIS FIRST AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

Petitioner argues that an attorney is deprived of his rights of procedural due process and equal protection of the laws afforded him by the Constitution of the United States when the Court of Appeals of Kentucky sits as a trial judge without having personal observations of witnesses to protect the accused from prejudice.

Under an order of the Chief Justice of the Court of Appeals of Kentucky dated June 26, 1973, the chairman of the trial committee charged with the duty of hearing evidence in the case was designated and commissioned by the court to hear the evidence involved in this disciplinary proceeding. (Appendix B, p. 1b).

The entire disciplinary proceedings of the Kentucky Bar Association result from both a constitutional delegation of legislative authority of the Kentucky General Assembly directing the court to set ethical standards and disciplinary procedures to enforce those standards by virtue of KRS 30.170 (Petition, Appendix, pp. 2a-3a) and the widely recognized inherent power of Court of Appeals of Kentucky to establish rules of practice and procedure for disciplining attorneys. *Chreste v. Commonwealth,* 171 Ky. Rept. 77 (1916); *Commonwealth v. Buckingham,* 267 Ky. Rept. 627 (1937); *In re Rudd,* 310 Ky. Rept. 630 (1949); *Kentucky State Bar Assn. v. Stivers,* Ky., 475 S.W.2d 900 (1972) (Cert. denied, 406 U.S. 968).

The Respondent herein serving as an administrative arm of the Court of Appeals of Kentucky conducted, through its Inquiry Tribunal (in effect finds probable cause to believe unprofessional conduct has occurred and thereby votes a charge), its trial committees and its Board of Governors, proceedings to form a record showing Petitioner's misconduct and giving advice to the court on recommended findings of fact and the degree of discipline to be imposed. Petitioner alleges no unconstitutional procedures at the trial committee stage when the transcript of evidence was made for the court. All constitutional safeguards were provided the Petitioner at this stage of the proceedings, including (a) the right to challenge the qualifications of any member of the trial committee, RCA 3.250; (b) the right to be represented by counsel, RCA 3.300; (c) right to a hearing, RCA 3.300; and (d) all rights afforded a party by the Rules of Civil Procedure, including the right to introduce evidence, cross-examine

witnesses, compel the attendance of witnesses, the right to remain silent, RCA 3.300. (Appendix A, p. 1a).

The trial committee proceedings, therefore, were without question in conformity, compliance, and with complete regard for the Petitioner's rights to procedural due process. The Petitioner did not intimidate or suggest that any evidence, reports, etc., were improperly before the trial committee or that they were in any way influenced by any testimony not presented into evidence, all of which the Petitioner had a right to inspect and cross-examine. RCA 3.350 specifically provides that the proceedings shall be reported, and if the recommendation is other than a private reprimand then the proceedings shall be transcribed. (Appendix A, p. 2a). It is the transcript of evidence at the trial committee hearing which provides the court with the necessary information on which to base its decision as to disciplinary sanctions. They had before them the "evidence" that was in fact before the trial committee, all of which was subject to objections and cross-examination by petitioner's counsel.

The rules provide a further step in which the Board of Governors considers the entire record. It may then decide whether the accused is guilty or not guilty. It affords additional protection in that if the accused is found not guilty, the Board's action is final. See RCA 3.370. (Appendix A, pp. 2a-3a). If an accused is guilty, the Board then votes on the degree of disciplinary action to be recommended. Other than a private reprimand, all degrees of discipline are *only recommendations* to the court. The rules specifically recognize that *any order recommending to the court that disciplinary action be taken shall be advisory only.* RCA 3.370. (Appendix, pp. 2a-3a).

The Court of Appeals then under its inherent and statutorily recognized powers ultimately passes on the question of whether or not the accused is guilty of professional misconduct; and if so, the degree of discipline to be imposed. The Court of Appeals is the only body empowered to impose discipline other than a private reprimand.

The recitation of the procedure is extremely important in exposing two very basic points:

(1) The *trial committee is the hearer of evidence* and they provide all the constitutional safeguards to the accused and make a transcript of all the evidence, and

(2) The Court of Appeals is the *only* body which can or does officially impose any sanction or passes finally on the guilt or innocence of the attorney as well as the imposition of discipline.

Therefore, it is clear that the trial committee and Board of Governors were acting only in an advisory capacity based on the evidence presented at the trial committee hearing. The Board of Governors and the trial committee are in no way the adjudicators of *fact* and in no way render any *final decision* in regard to disciplinary sanctions. It is merely an advisory agent of the court and as the name suggests, its advice may be freely rejected by the court which it frequently has done, and which it in fact did in this case by increasing the suspension from a recommended one month to a six month suspension. It is certainly clear that "the court" is the only one that will make the ultimate decision in disciplinary cases.

The Court of Appeals of Kentucky clearly stated in its opinion it had reviewed all of the evidence presented. (Petition, Appendix, p. 20a). It had the advice of the trial committee who observed the witnesses during the evidentiary hearing and the Board of Governors. It is submitted that the fact the witnesses at the hearing did not personally appear and testify before the Court of Appeals of Kentucky in no way denied Petitioner his constitutional rights. The evidence in this case was accurately, completely and clearly before the court in the disciplinary transcripts.

It is interesting to note that in the Harrison County contempt case comprising Count I of the second charge, Petitioner was found in contempt by the county court, had a de novo trial on the contempt citation in circuit court which affirmed the county court, plus forums for reply before the Inquiry Tribunal of Respondent, a full trial hearing on all the evidence, a review of all the evidence by the Board of Governors of the state bar association and finally a full review of all evidence before the Court of Appeals of Kentucky after responding to a rule to show cause and later the filing of a petition for rehearing. Beyond any doubt whatsoever, Petitioner has had all his due process rights protected throughout all proceedings involving this matter.

The first charge which was recommended for dismissal by the trial committee, the Board of Governors and the Court of Appeals demonstrated the ability of the latter two forums to review a transcript, weigh testimony and find for Petitioner without personal appearance of witnesses before the court. The same expertise of these forums is demonstrated in finding Petitioner guilty as charged on counts in the second charge. The guilt findings are well founded in the record showing a severe course of unethical and unprofessional conduct impeding the administration of

justice. The court in fact used its own judgment from a review of all the evidence. The clear course of unethical and unprofessional conduct openly displayed by Petitioner was clearly cited by the court. (Petition, Appendix, pp. 24a-25a).

Petitioner contends that the many inconsistencies in the testimony of witnesses made personal observations of witnesses giving evidence in the record by the Court of Appeals of Kentucky especially neecssary to a determination of credibility. It is submitted that the Court of Appeals of Kentucky, an appellate court, is well qualified to review a transcript and ascertain the truth therefrom after weighing all the evidence. All records have their inconsistencies. The proposition is not foreign to appellate courts. The record in this case was extremely detailed and well documented.

Petitioner argues for the first time in this disciplinary case in his Petition for Writ of Certiorari that the Court of Appeals of Kentucky holds that these cases are civil rather than quasi-criminal in nature. While this argument was never raised in the Court of Appeals of Kentucky and it is not properly before this court, the erroneous argument will be answered. While older decisions of the Court of Appeals of Kentucky state that disciplinary rules are civil in nature, Rule 3 of that court recognized and fully protected Petitioner's rights to procedural due process of law without exception. Respondent cites with pride its compliance with the American Bar Association's Report on Disciplinary Enforcement (1970) authored by retired Supreme Court Justice Tom C. Clark. A comparison of the model rules for state disciplinary agencies when they were released in 1970 and Rule 3 of the Court of

Appeals of Kentucky in effect at that time will show that Kentucky had the model structure almost without exception. Amendments to Rule 3 effective July 2, 1971, brought Kentucky in nearly complete compliance with the model. This court reviewed these procedures in Kentucky in *Kentucky State Bar Assn. v. Stivers, supra,* and denied a petition for writ of certiorari. This court again reviewed Kentucky's disciplinary rules in the case of *Kentucky State Bar Assn. v. Smith*, Ky., 492 S.W.2d 880 (1973), (cert. denied, 414 U.S. 859). The impact of the Clark report has been felt in every state. There has been a restructuring of disciplinary machinery in most states. Effective guidelines insuring procedural due process of law in disciplinary proceedings are in existence and proving extremely effective in Kentucky. State action has proved effective and no action by this court is needed. The Court of Appeals of Kentucky exercising its inherent power has made the burden of proof in disciplinary cases on Respondent by a test of proving unethical and unprofessional conduct by a preponderance of the evidence. This test is effective and fair to all. This test was set by the court in its discretion and is a matter of state law, raising no federal question.

Petitioner argues that KRS 30.170 creating a unified bar in Kentucky is lacking in standards and procedural safeguards as to make its effects uncertain as to deny attorneys due process of law and equal protection of the law, as well as permitting the Court of Appeals of Kentucky to enact rules susceptible of sweeping and improper application limiting first amendment freedoms. (Petition, Appendix, pp. 1a, 2a).

It is clear in Kentucky law that the Court of Appeals of Kentucky has inherent authority outside of

KRS 30.170 to promulgate its Rule 3. In speaking of the repeal of an old Kentucky statute providing for disciplinary measures where an attorney is convicted of a felony, the court stated:

> "The repeal of a statute pertaining to the practice of law amounts to a recognition on the part of the legislative branch of government of the inherent power of the judicial branch to prescribe such rules as are necessary to qualify, regulate and govern its own officers. 'All courts have, as an incident of the power to admit attorneys to their bar, the power to disbar them for such conduct as shows they are not longer worthy of confidence.' *Underwood v. Commonwealth,* 105 S.W. 151, 32 Ky. Law Rep. 32." *In re Rudd,* Ky., 221 S.W.2d 688 at 689 (1949).

The Respondent has argued above that Rule 3 of the Court of Appeals of Kentucky are model disciplinary rules. They are clear and certain. They afforded Petitioner every constitutional safeguard as a matter of Kentucky law. No valid federal question is raised in Petitioner's argument.

RCA 3.130 recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of professional conduct required of members of the bar and that charges may be brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute. (Petition, Appendix pp. 3a-4a). Petitioner would have this court believe that the Court of Appeals of Kentucky disciplined Respondent just because Petitioner out of the courtroom called a county attorney a "damn liar." (Petition, p. 46). Petitioner contends such conduct is protected by the First Amendment to the Constitution of the United States. The court's per curiam found on two instances he had used such language *in addition* to paying no attention to the rulings of the judge, being loud and boisterous, badgered and harrassed a witness and pointed his finger a short distance from the trial judge in a threatening and disrespectful manner. (Petition, Appendix, pp. 22a-23a). All of these factors caused the court to declare a mistrial and concluded with Petitioner being found in contempt of court. There is no doubt that such conduct clearly is prejudicial to the administration and adversely reflects on Petitioner's fitness to practice law under the American Bar Association Code of Professional Conduct DR 1-102(A) (5), (6) stating:

> "DR 1-102 Misconduct
> (A) A lawyer shall not:
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Obviously, the First Amendment protection of freedom of speech does not license a lawyer to be disrespectful to another officer of the court and the judge —in or out of the courtroom thereby causing a failure in the administration of justice in the courts. It is submitted that the seven Justices on the Court of Appeals of Kentucky, elected by the popular vote of their constituents, are well qualified to represent the public in determining what standards of conduct should be met by officers of the court in Kentucky. The court has used sound discretion in setting standards of conduct for officers of the court. There is no federal question raised in connection with these standards.

Petitioner argues that because he was found innocent on the counts of the first charge by the Court of Appeals of Kentucky he should not have to pay all the costs in the proceeding as required by RCA 3.450 (Appendix A, pp. 3a-4a). The court has determined in its sound discretion that in disciplinary matters where a lawyer has been disciplined he must pay the costs of the proceeding rather than place the cost on Respondent which is solely supported by the dues of its members. The concept is not only fair and reasonable, but sound as a matter of policy. The Court of Appeals of Kentucky had before it the issue of whether the provisions of RCA 3.450 should be waived in Petitioner's case. The court, using its sound discretion, denied the request for waiver. No federal question is raised in connection with this decision.

In summary, the position of the United States Supreme Court, in relation to the fundamental interest of the states in setting standards for professions, has been recently affirmed in *Goldfarb v. Virginia State Bar, et al.*, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed.2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."

The decision below was based, in fact, on an adequate and independent non-federal ground.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT.

Petitioner argues that his six months suspension period was so lacking of a rational basis in evidence as to be arbitrary and discriminatory and thus a denial to him of due process of law and equal protection of the laws.

Petitioner contends that the charges filed by Respondent were instituted by the state bar association: not by parties observing his conduct. Petitioner accuses the Court of Appeals of Kentucky of ignoring evidence in the record.

The Court of Appeals of Kentucky has clearly defined the authority of the state bar association to institute disciplinary investigations it finds appropriate to discover unprofessional conduct on the part of a lawyer. *In re Gilbert*, 118 S.W.2d 535 at 536 (1938).

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It is clear in the Per Curiam Opinion below the Court of Appeals of Kentucky reviewed the ten volumes of evidence heard by the trial committee and the Board of Governors. (Petition, Appendix, p. 20a). The opinion clearly states the evidence it found in the record to support its findings.

The trial committee's findings of fact are not so much at variance with the finding of the Court of Appeals of Kentucky as to the allegations of the counts of the second charge as are the standards of conduct applied to the common facts found by both bodies. The court clearly stated the standard applied by the trial committee will have to be upgraded. (Petition, Appendix, p. 24a). A six months suspension period in view of the aggravated course of unprofessional conduct displayed by Petitioner is certainly reasonable. An advocate's excesses cannot be tolerated:

> "We suppose that an attempt to outlaw gallery play in the courtroom would be about as successful as the current effort to ban the private possession of firearms. Nevertheless, intoxication induced by his own histrionics cannot excuse an advocate's excesses. He indulges at his own risk. Under our system the jury's function is to weigh the evidence unalloyed by other factors, and it is the lawyer's obligation to preserve the integrity of that system. The intentional introduction of improper information or comment amount in plain words to cheating.
>
> It is common knowledge that in certain widely publicized trials of recent years a new breed of lawyers has instituted the studied technique of baiting the trial judge in order to convey to the public an impression that its courts are instruments of discrimination and injustice. Frequent contempt citations are the hallmark of that technique. It will not be tolerated in this jurisdiction." *Ky. State Bar Assn. v. Taylor,* Ky., 482 S.W.2d 574 at 583, 584 (1972).

Petitioner seeks to relitigate his case on factual issues before this court. A cursory examination of the court's opinion in this case reveals that the court considered all the factual and evidentiary matters in this case. If the court gave little significance to the Petitioner's evidence it was due to a lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, the Petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the Court of Appeals and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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243 State Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1975, I served on Honorable Raymond Francis Connell, 326 Main Street, Paris, Kentucky 40361, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

APPENDIX

APPENDIX A

RULES OF THE COURT OF APPEALS OF KENTUCKY

3.250 Challenge to Qualifications of Trial Committee.

Any time, not later than ten days before the date set for hearing the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge, the Chairman of the House shall relieve the challenged member and immediately fill the vacancy.

3.260 Joinder and Consolidation.

(a) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Tribunal be consolidated and tried as a single disciplinary case.

(b) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Tribunal, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Committee shall make a separate report to the Board as to each.

3.300 Rights of Respondent Against Whom a Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel

and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himeslf by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.350 Transcript of Evidence.

The proceedings before the Trial Committee shall be reported by a reporter appointed by the Trial Committee. However, after hearing, if the Trial Committee is of the unanimous opinion that the respondent should only be administered a private reprimand or that all charges should be dismissed the Trial Committee may, with the consent of the parties, direct the reporter to preserve all notes of the hearing but defer a transcription of the record until ordered by the Board to prepare such transcript. In all other proceedings the testimony shall be transcribed.

3.370 Board's Action on Trial Committee's Report.

Upon receipt of the report of the Trial Committee the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice President and the fourteen duly elected mem-

brs of the Board from their respective appellate districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge, shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case.

The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in the proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action, and the Director shall mail copies of such order together with a copy of the Trial Committee's report to the parties or their counsel and to each member of the Tribunal. If discipline is recommended the entire record, together with a certified bill for costs and expense incurred in the investigation preliminary to, and in the conduct of, the proceedings shall be filed with the Clerk. Any recommendation to the Court that disciplinary action be taken shall be advisory.

3.450 Recovery of Costs.

(a) Every final order of the Board or the Court which adjudges the respondent guilty of unprofessional conduct shall provide for the recovery of all costs, including those certified under RCA 3.370. Immedi-

ately upon the effective date of the order the Clerk shall furnish a cost bill to the respondent, and if the bill is not satisfied within ten days thereafter, the Clerk shall issue one or more executions thereon, directed to the sheriffs of the counties in which the respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to the Association.

(b) Upon a final order of the dismissal of a complaint, cost may be assessed against the complainant if the Board feels the complaint groundless or made maliciously.

APPENDIX B

ORDER OF CHIEF JUSTICE DATED JUNE 26, 1973

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

V. DESIGNATION OF CHAIRMAN OF TRIAL COMMITTEE

RICHARD J. GETTY - - - - - - - *Respondent*

Pursuant to RCA 3.230, Hon. Robert E. Wohlwender, of Covington, Kentucky, is hereby designated and commissioned as Chairman of the Trial Committee heretofore appointed by the Chairman of the House of Delegates to try the issues in this proceeding.

This 26th day of June, 1973.

JOHN S. PALMORE
Chief Justice

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-125

RICHARD J. GETTY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY
EX REL KENTUCKY BAR ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Reply Brief is filed to call this Court's attention to three important factors relevant to this Court's consideration of this case.

1. THE STAY OF EXECUTION

On September 6, 1975, and in response to an application (No. A-71) that stressed the importance of the constitutional questions here at stake, Mr. Justice Stewart signed the following order:

> "IT IS ORDERED that the execution and enforcement of the judgment of the Court of Appeals of

> Kentucky in the above-entitled cause be, and the same is hereby, stayed pending this Court's disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court."

Thus the execution of the judgment below, which ordered that petitioner be suspended from the practice of law for 6 months, has been stayed until this Court can consider the important constitutional due process questions at stake.

2. THE IMMINENT PENDENCY OF TWO OTHER PETITIONS RAISING THE SAME CONSTITUTIONAL ISSUES

This Court may wish to defer action on the instant petition until it can consider two other petitions for writs of certiorari to review similar disciplinary actions by the Court of Appeals of Kentucky. Those petitions are to be timely filed during the last week of September, 1975, and are entitled *John W. Collis* v. *Kentucky Bar Association* and *Neville Tucker* v. *Kentucky Bar Association.*[1]

Both the *Collis* and the *Tucker* petitions will raise substantially similar constitutional challenges to the procedures utilized in all three cases by the Court of Appeals of Kentucky. Those petitions will serve to further refine and sharpen those challenges, and will enable this Court to assess the alleged due process in-

[1] The first of the undersigned counsel on this Reply Brief is also the counsel preparing the petition in *John W. Collis* v. *Kentucky Bar Association.*

firmities in a broader light. Those petitions will further demonstrate that the constitutional questions are not limited to this case alone, and arise from procedures being universally applied by the Court of Appeals of Kentucky to the detriment of all Kentucky lawyers charged with unprofessional conduct.

Petitioner therefore urges that consideration of his petition be withheld until this Court can reach the *Collis* and *Tucker* cases. Since the *Collis* and *Tucker* petitions will soon be filed, before the end of September, they should be ready for consideration late in October or early in November, depending on the movement of this Court's certiorari docket.

In the interest of justice to this petitioner and to the other two Kentucky lawyers, Collis and Tucker, petitioner suggests that this Court may wish to defer action on the instant petition so that all three petitions may be considered and resolved together.

3. THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL

The constitutional questions that are common to all three cases are both important and novel, and fully warrant the grant of certiorari so that they may be definitely resolved. They arise out of disciplinary procedures that are utilized in many different states.[2] Hence the constitutional questions are of nationwide concern.

The Brief in Opposition filed herein by the Kentucky Bar Association serves, somewhat inadvertently, to

[2] See, e.g., New Jersey Supreme Court Rule 1:20; Maryland Ann. Code, Art. 10, §§ 11-23; Illinois Rev. Stat. § 110A.

highlight the two basic constitutional questions at stake, to wit:

(a) Is the Complete Absence of Any Opportunity for a Hearing Before the Board of Governors a Denial of Due Process?

It is undenied that the proceedings before the intermediate advisory body, the 15-man Board of Governors, are held *in camera.* The accused lawyer is given no notice and no opportunity to appear before the Board to plead his case or to argue in support of, or in opposition to, the findings and recommendations of the subordinate trial body, the 3-man Trial Committee. Nor does he have any chance to urge that the Board acquit him of all charges.

But can such a complete denial of due process be excused on the theory that the Board's actions are "only advisory" to the Court of Appeals of Kentucky?[3] That theory certainly evaporates whenever the Board exercises its power to acquit the accused lawyer. The Court's own rule, Rule 3.370, provides that

> "If the respondent be found not guilty, the Board's action is final."

The Board thus appears to be the final adjudicative body with respect to "not guilty" determinations.

If that be true, has not this petitioner been denied a valuable due process right to appear before the Board

[3] RCA 3.370 provides that any recommendation by the Board that disciplinary action be taken by the Court of Appeals "shall be advisory." The court itself has repeatedly stressed that the Board's recommendations are "only advisory." *Kentucky State Bar Association* v. *Stivers,* 475 S.W. 2d 900, 903 (Ky. 1971). See also Brief in Opposition, p. 11.

and urge that it find him "not guilty" of all charges?[4] In *Southern Railway Co.* v. *Virginia,* 290 U.S. 190, 197-198 (1933), this Court held that when an administrative body is "empowered, without notice or hearing, to act with finality upon [its] own opinion," the "inhibitions of the Fourteenth Amendment" outlaw the administrative body's action in rendering an unfavorable final determination. The question left unresolved by this Court is whether the same result follows when the administrative body, having denied all opportunity to urge upon it a favorable final determination, fails to render such a determination—a determination that might have been made had the Board given this petitioner the rudiments of a due process hearing. So elementary, yet unresolved, a question arising under the Fourteenth Amendment deserves resolution by this Court.

That question is exacerbated, of course, by the fact that at the time of the Board's *in camera* action, the petitioner had not been advised of the Trial Committee's findings and recommendations. Hence at that point was he not additionally denied the constitutional right "to be fairly advised" of the committee's action and "to be heard upon its proposals" before the Board, the administrative body that could finally determine his innocence on the basis of the evidence before the Trial

[4] Seemingly contrary to Rule 3.370, the Court of Appeals in this case found the petitioner guilty of three counts in Charge II as to which the Board of Governors found him "not guilty." But the Board had found him guilty on another count in Charge II, and the Court of Appeals agreed. Perhaps the Court believes it can review the entire case if the Board has found the attorney guilty on any one count or charge, and change any "not guilty" determinations it wishes upon such a review. The propriety of the Court of Appeals' actions in this respect is not at all clear.

Committee? See *Morgan* v. *United States,* 304 U.S. 1, 18-19 (1938).

(b) Since the Court of Appeals Proclaims Itself To Be the Sole Judge of All Factual Issues, Does Its Failure To Hold a Full Factual Inquiry Constitute a Denial of Due Process?

The Court of Appeals has repeatedly asserted and exercised its self-proclaimed principle that

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this Court . . . . This means, of course, that in the end this Court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." *Kentucky State Bar Association* v. *Stivers,* 475 S.W. 2d 900, 903 (Ky. 1971).

In this case, as in all Kentucky disciplinary proceedings, the Trial Committee did hold a full evidentiary hearing in compliance with due process requirements. But the impact of that due process hearing was lost by the time the case reached the ultimate and *de novo* fact-finder, the Court of Appeals. While that court had the written transcript of the Trial Committee hearing before it, the Court of Appeals deemed itself free to ignore the committee's findings, to assess the facts as the court saw fit, and to make its own determinations as to the credibility of witnesses or other evidence. No attempt was made to approve or disapprove the Trial Committee's fact findings in light of any form of a substantial evidence standard.

Now it is true that "The demands of due process do not require a hearing, at the initial stage or at any

particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-153 (1941). But that principle would appear inapplicable if the results of "the requisite hearing" are totally ignored, or are considered advisory only, by the ultimate fact-finder. Indeed, that seems to be the implication of the decision of this Court in *Willner* v. *Committee on Character,* 373 U.S. 96, 104 (1963), a bar admission case. The Court there held that where the Appellate Division of the New York Supreme Court had held no hearings of its own to determine an applicant's character, but relied entirely upon the inadequate report of a 3-man committee, the Appellate Division could not escape the requirement of due process by claiming that the committee's action was merely advisory.

The precise question left unresolved is whether a committee's action that is truly advisory and that is totally ignored can provide the fact-finding Court of Appeals an escape from the requirements of due process. Is not the Court of Appeals then obliged to provide a due process hearing of its own if it is to make its own fact findings, independently from those found by the Trial Committee? That is the important question that deserves attention by this Court.

A final word needs to be said about the argument in the Brief in Opposition (pp. 6-9) that the decision below rests on adequate non-federal grounds. The answer to that argument is that the petitioner did raise the foregoing federal constitutional claims before the Court of Appeals. Its failure to discuss them operates as a denial of those claims, making it impossible to

interpret the opinion as resting solely on adequate non-federal grounds. *New York ex rel. Byrant* v. *Zimmerman,* 278 U.S. 63, 67 (1928).

CONCLUSION

For these reasons, supplementing those in the petition, this petition for writ of certiorari should be granted at the time when this Court also has before it the *Collis* and *Tucker* petitions.

Respectfully submitted,

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September 18, 1975

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IN THE

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No. 75-125

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Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S REPLY BRIEF

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IN THE

Supreme Court of The United States

October Term, 1975

No. 75-125

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COMMONWEALTH OF KENTUCKY EX REL
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Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

RESPONDENT'S REPLY BRIEF

Petitioner's Reply Brief raises new issues which must be answered to assist the Court in its consideration of this case.

1. THE PENDENCY OF TWO OTHER PETITIONS RAISING THE SAME CONSTITUTIONAL ISSUES

Petitioner calls to the Court's attention the cases of *John W. Collis v. Kentucky Bar Association* (No. 75-471) and *Neville Tucker v. Kentucky Bar Association*, which he states will be filed during the last week of September, 1975, allegedly raising substantially similar constitutional challenges to the disciplinary procedures of the Kentucky Court of Appeals. Petitioner requests that action be deferred on this case until all three cases can be reviewed together.

It is respectfully submitted that no good purpose can be

served by delaying a determination on this case in the light of any subsequent cases to be filed. For this Court to set such a policy would naturally delay this Court's business in the future and do substantial damage to the ability of the Kentucky Court of Appeals to effectively discipline the officers of its court. The fact that intermittent effectiveness of the mandate of the Kentucky Court of Appeals has permitted respondent to practice one day and not the next during his process of filing a Petition for Writ of Certiorari has caused considerable confusion at the Kentucky bench and bar. A further delay in rendering justice in this case will contribute to the confusion of the past several months.

It is believed that opposing counsel was unaware that this Court has granted Neville M. Tucker an extension of time to file his Petition for Writ of Certiorari until and including November 10, 1975. The extension was granted on September 19, 1975. To delay consideration of the *Getty* case in order to join it with the *Tucker* matter can serve no useful purpose. The *Tucker* case involved no issue of fact whatsoever. Mr. Tucker failed to file an answer to the initial complaint and failed to file an answer to the formal charge. This case is totally dissimilar from the *Getty* case.

The *Collis* Petition for Writ of Certiorari has been filed. To further delay the Court's decision in this case to join it with the *Tucker* case will result in continued damage to the citizens of the Commonwealth of Kentucky. Upon a review of the opinion of the Court of Appeals of Kentucky appended to the *Collis* Petition for Writ of Certiorari as Appendix A, it will be discovered that Mr. Collis converted his clients' funds to his own use. His continued ability to hold himself out as a practicing attorney is placing the public interest in great peril. It is respectfully called to the Court's attention that at no time during the proceeding in the Kentucky Court of Appeals did Mr. Collis argue that that court should provide it with a due process evidentiary hearing before the Justices or Commissioners of that court. It cannot be argued now on appeal to this Court.

2. CONSTITUTIONAL QUESTIONS

There are no substantial constitutional questions raised in this case. The constitutional questions raised by petitioner are not of nationwide concern. Respondent is unaware of any cases in the past that have raised similar issues before this court from other jurisdictions. Respondent is unaware of any conflicting decisions in other states regarding the constitutional questions raised in this case.

(a) There is No Denial of Due Process Where a Lawyer is Not Given Any Opportunity for a Hearing Before the Board of Governors.

Petitioner states that a 15-man Board of Governors considers disciplinary cases. There are 17 Board members that hear disciplinary cases. Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues in the proceeding. (See Appendix B to Brief for Respondent in Opposition.)

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Kentucky Court of Appeals, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, complaints were initiated after a complete investigation of the matters alleged in the charge of unprofessional conduct. Notice was given of the complaints and timely responses were filed. The Inquiry Tribunal reviewed the complaints and responses and determined that probable cause existed to conclude that respondent had been engaged in unprofessional conduct; therefore, charges were filed. Respondent received notice of the charges and filed timely answers thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge and transcript of proceedings before the trial committee were reviewed by the Board of Governors without the presence of counsel on either side. The Board of Governors

had three alternatives: dismiss the charges, issue a private reprimand or recommend public discipline to the Kentucky Court of Appeals. If the first two alternatives had been exercised, the case would have terminated without any detriment to petitioner and the Board's function as a "screening" device would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Kentucky Court of Appeals discipline. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point again had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Kentucky Court of Appeals was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

(b) The Absence of a Full Factual Inquiry Before the Justices of the Kentucky Court of Appeals in Person Where the Court Judges all Factual Issues, Does not Deny Due Process.

The aforesaid issue was not argued before the lower court and is, therefore, not properly before this Court; however, the issue will be discussed.

The Kentucky Bar Association, by statute (KRS 30.170) and Rule 3 of the Kentucky Court of Appeals, is an adminis-

trative arm of the court for the purpose of enforcing the standard of conduct for attorneys set by the court and for the purpose of prohibiting the unauthorized practice of law. The court has rightly retained ultimate fact finding and imposing of public discipline to itself under the court's widely recognized inherent power to discipline its officers in the interest of public protection. Kentucky disciplinary actions are original actions by the court in the court. Trial committee hearings are, in effect, hearings by the court. There is no validity to the argument that the impact of the due process hearing is lost by the time the matter reaches the court. Where the ultimate fact finding function is retained by the court, there is certainly no need for a "substantial evidence standard."

The record of this case clearly demonstrates the advisory findings of the trial committee and the Board of Governors were not ignored by the Kentucky Court of Appeals. The court's opinion (Petition, Appendix p.17) clearly recites that all evidence was reviewed. Both the Board and the court agreed with the trial committee's conclusions as to counts of the first charge and found petitioner not guilty. On the second charge, the court found petitioner guilty and gave a detailed analysis of the facts supporting the conclusion. The record is really clear as to petitioner's conduct in the factual context. Petitioner's main objection is that such conduct does not constitute unprofessional conduct. The court found it to be clear misconduct and ordered appropriate discipline. This case clearly rests on an adequate non-federal ground.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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Counsel for Respondent

October 3 , 1975

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of October, 1975, I served on Honorable Eugene Gressman, 1828 L Street, N.W., Washington, D.C. 20036, and Honorable Raymond Francis Connell, 326 Main Street, Paris, Kentucky 40361, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER